Supreme Court, U.S.
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No. 01 144

IN THE

Supreme Court of the United States

FULTON COUNTY, GEORGIA, *et al.*,
Petitioners,

v.

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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82 pp

QUESTIONS PRESENTED

I. Before enacting an ordinance that seeks to address negative secondary effects associated with adult entertainment establishments, must a local government await actual development of such negative secondary effects within its jurisdiction, or may the local government legislate in a preventative fashion based upon evidence of such negative secondary effects from other local government jurisdictions?

II. Where a local government relies upon judicially approved studies from other jurisdictions indicating that negative secondary effects are associated with adult entertainment establishments, does a resulting local government ordinance that prohibits the service or consumption of alcohol at adult entertainment establishments violate the First Amendment because studies specific to that local government's jurisdiction did not indicate negative secondary effects associated with such establishments?

LIST OF PARTIES & RULE 29.6

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Fulton County, Georgia,
Appellee Below.

The Board of Commissioners of Fulton County, Georgia,
Appellee Below.

Mitch Skandalakis,
Appellee Below.

Nancy Boxill,
Appellee Below.

Gordon Joyner,
Appellee Below.

Robert Fulton,
Appellee Below.

Tom Lowe,
Appellee Below.

Emma Darnell,
Appellee Below.

Michael Hightower,
Appellee Below.

Flanigan's Enterprises, Inc. of Georgia,
Appellant Below.

6420 Roswell Road, Inc.,
Appellant Below.

Harry Freese,
Appellant Below.

Fannies, Inc.,
Appellant Below.

LIST OF PARTIES & RULE 29.6—Continued

William H. Parks, Jr.,
Appellant Below.

Ceeda Enterprises, Inc,
Appellant Below.

Pursuant to Rule 29.6, Petitioners state that the named Petitioners do not have any corporate parent, subsidiary, or affiliate that is publicly held.

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PETITION FOR A WRIT OF CERTIORARI

Fulton County, Georgia, and its elected Board of Commissioners, (hereinafter "Fulton County"), through undersigned counsel, respectfully request that this Court issue a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit that reversed, in significant part, the decision of the United States District Court for the Northern District of Georgia granting Fulton County's motion for summary judgment. Fulton County shows to this Court that the Eleventh Circuit has entered a decision in conflict with 1) prior decisions of this Court, as well as prior decisions of the Eleventh Circuit, and 2) decisions of other United States Courts of Appeals, including the Third, Fourth, Seventh and Eighth Circuits. Additionally, this Court has recently agreed to review a similar decision by the Ninth Circuit Court of Appeals. *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, __ U.S. __, 121 S.Ct. 1223 (March 5, 2001) (Docket No. 00-799).

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 242 F.3d 976 and is reprinted at Pet. App. 1a-23a. The order of the District Court granting summary judgment in favor of Fulton County is reprinted at Pet. App. 24a-43a. The Court of Appeals' order denying Fulton County's petition for rehearing *en banc*, to be published in a table at __ F.3d __, is reprinted at Pet. App. 44a-45a.

STATEMENT OF JURISDICTION

The judgment of the Court of Appeals was entered on February 20, 2001. *See* Pet. App. 1a. A timely petition for rehearing *en banc* was denied by the Court of Appeals on April 23, 2001. *See* Pet. App. 44a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND LOCAL ORDINANCE PROVISIONS INVOLVED

This case involves the following constitutional provision, the pertinent portion of which is set forth below:

> Congress shall make no law . . . abridging the freedom of speech . . . .

U.S. CONST. amend I.

This case also involves the following Fulton County, Georgia ordinance provision, the pertinent portions of which are set forth below:

> Any person, firm, partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:
>
> . . .
>
> (7) No licensee shall permit any alcoholic beverages to be served, offered, or consumed on the premises.

Fulton County (Georgia) Code of Laws, § 18-76, as amended December 17, 1997. *See* Pet. App. 46a-50a.

STATEMENT OF THE CASE

The present case stems from the enactment of a December 17, 1997 amendment to Fulton County Code of Laws § 18-76, which amendment prohibited the serving, offering or consumption of alcohol at clubs offering live nude, or partially nude, performances (hereinafter "adult entertainment establishments" or "adult entertainment clubs").[1] *See* Pet.

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[1] By reference to the Fulton County Zoning Resolution, Fulton County's adult entertainment licensing ordinance defines "adult entertainment" as "[p]ermitting, performing, or engaging in live acts (1) of touching, caressing, or fondling of the breasts, buttocks, [] anus, vulva, or genitals, (2) of displaying of any portion of the areola of the female breast,

App. 49a. The above-referenced amendment is hereinafter referred to as "the Fulton County Ordinance" or "the Ordinance". In adopting the Ordinance, Fulton County considered studies from other local governments throughout the United States, which demonstrated that negative secondary effects are associated with adult entertainment establishments. *See* Pet. App. 5a, 47a. Additionally, Fulton County considered studies of crime statistics and property values around the existing adult entertainment establishments in Fulton County; however, those studies did not identify then-existing negative secondary effects associated with those specific establishments. *See* Pet. App. 3a-5a, 46a-47a. The Eleventh Circuit ruled that the Fulton County Ordinance violated the Respondents' free speech rights under the First Amendment to the U.S. Constitution, in that the Ordinance failed to satisfy the second prong of the *United States v. O'Brien* test for content-neutral regulations (i.e., the regulation must further a substantial government interest). *See* Pet. App. 17a-18a. More specifically, the Eleventh Circuit held that the Fulton County-specific studies "disproved" the findings of the studies from other jurisdictions, such that Fulton County was constitutionally prohibited from using the voluminous evidence from other jurisdictions as the basis of adopting the Ordinance. *See* Pet. App. 16a-18a. Accordingly, the Eleventh Circuit reversed, in significant part, the District Court's grant of summary judgment to Fulton County.

The Eleventh Circuit's holding—that Fulton County cannot adopt a regulation such as that contained in the Fulton County

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or any portion of his or her pubic hair, cleft of the buttocks, anus, vulva or genitals, (3) of displaying of pubic hair, anus, vulva, or genitals, (4) of acts which simulate sexual intercourse (homosexual or heterosexual), masturbation, sodomy, bestiality, oral copulation [or] flagellation." Although this definition is not set forth in the record, it is undisputed that Respondents' establishments engaged in "adult entertainment".

Ordinance due to a lack of evidence that Fulton County was then experiencing significant problems with adult entertainment establishments—fails to follow the precedent established by this Court on the issue of what evidence will suffice to support governmental regulation of adult uses and is in direct conflict with the decisions of several other United States Court of Appeals on this issue. Therefore, Fulton County now petitions the Court for a Writ of Certiorari, in order that this Court may correct the errors of the Court of Appeals.

A. Background

On December 17, 1997, Fulton County, through its Board of Commissioners, amended Section 18-76 of its adult entertainment ordinance to prohibit the serving, offering or consuming of any alcoholic beverages on the premises of adult entertainment establishments. *See* Pet. App. 46a-50a.

Prior to the adoption of the Fulton County Ordinance, Fulton County, along with the adult entertainment establishments located in Fulton County, jointly conducted studies regarding negative secondary effects related to the then-existing adult entertainment establishments in Fulton County (hereinafter the "County studies"); four of those establishments are owned by Respondents. The study of police activity determined that, for the years reviewed, the total number of police calls to the adult establishments were less than the total number of police calls to other nightclubs that did not offer adult entertainment. Also, an appraisal report found that property values were not declining in the vicinity of the adult establishments. *See* Pet. App. 4a-5a.

The Fulton County Board of Commissioners did not limit its examination of adult entertainment establishments to the County studies. Additionally, the Board of Commissioners considered multiple other studies from other jurisdictions. The additional studies—derived from the cities of Austin, Texas, Los Angeles, California, Indianapolis, Indiana, and

Minneapolis, Minnesota,—found negative secondary effects caused by adult entertainment establishments. *See* Pet. App. 5a, n.3.

On November 19, 1997, the Board of Commissioners conducted a public hearing on the proposed Ordinance; at that hearing, the Board received testimony from representatives of the adult entertainment establishments opposing the Ordinance, as well as testimony from citizens in favor of the proposed Ordinance. Following a second public meeting on December 17, 1997, the Board of Commissioners adopted the Fulton County Ordinance, such that Fulton County Code of Laws § 18-76, regarding adult entertainment establishments, thereafter read, in relevant part, as follows:

> Any person, firm, partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:
>
> . . .
>
> (7) No licensee shall permit any alcoholic beverages to be served, offered, or consumed on the premises.

See Pet. App. 48a-49a.

Prior to enacting the Ordinance, the Board of Commissioners considered (1) the County Studies; (2) the studies from Austin, Indianapolis, Minneapolis and Los Angeles; and (3) comments received at the November 19, 1997 public hearing. Indeed, Fulton County stated its purposes in adopting the Fulton County Ordinance in the preamble:

> WHEREAS, in a public hearing held November 19, 1997, the Board of Commissioners heard testimony and received studies from its staff, the public, and from representatives of the adult entertainment industry concerning negative secondary effects connected with

adult entertainment facilities where alcoholic beverages are consumed, and live nude, or partially nude, performances are presented;

WHEREAS, based upon the experience of other urban counties and municipalities, which experiences the Board of Commissioners finds are relevant to the problems faced by Fulton County, Georgia, and which do not vary greatly among generally comparable communities within this country, the Board of Commissioners finds that public nudity, under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in adult entertainment facilities offering live entertainment, begets criminal behavior and tends to create undesirable community conditions;

WHEREAS, among the undesirable community conditions identified with live nude entertainment and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior herein above described, and acceleration of community blight by the concentration of such establishments in particular areas;

WHEREAS, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare, and it is a matter of governmental interest and concern to prevent the occurrence of criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow or encourage nudity; . . .

See Pet. App. 46a-48a.

B. Proceedings Below

The various Respondents, owners of four adult entertainment establishments located in unincorporated Fulton County, Georgia, filed three lawsuits in the United States District Court for the Northern District of Georgia. Those lawsuits named Fulton County and its Commissioners as defendants and challenged the December 17, 1997 Fulton County Ordinance that prohibits the sale or consumption of alcohol at adult entertainment establishments. Following consolidation of those actions, the Hon. G. Ernest Tidwell granted Fulton County's motion for summary judgment on all claims on February 4, 2000. *See* Pet. App. 24a-43a. More specifically, the District Court held that the Fulton County Ordinance was a content-neutral regulation and that the Ordinance satisfied the four-part test for content-neutral regulations announced in *United States v. O'Brien*, 391 U.S. 367 (1968), including the requirement that the regulation further a substantial governmental interest. *See* Pet. App. 32a-33a. Additionally, the District Court rejected Respondents' due process, prior restraint, and impairment of contract claims. *See* Pet. App. 34a-39a.

On February 20, 2001, a panel of the Eleventh Circuit reversed in part and affirmed in part the District Court's decision. *See* Pet. App. 2a. The Eleventh Circuit agreed that the District Court correctly rejected Respondents' due process, prior restraint, and contract impairment claims. *See* Pet. App. 19a-23a. Additionally, the Eleventh Circuit affirmed the District Court's holding that the Fulton County Ordinance was a content-neutral regulation. *See* Pet. App. 13a. However, in reversing the District Court, the Eleventh Circuit held that the Fulton County Ordinance did not further a substantial government interest, and was therefore violative of the First Amendment to the U.S. Constitution under the *O'Brien* test. *See* Pet. App. 15a-19a. The Eleventh Circuit based this holding on its conclusion that, in adopting the

Fulton County Ordinance, Fulton County could not reasonably rely, as a matter of law, on evidence contained in studies from other jurisdictions, because studies specific to Fulton County did not identify currently-occurring negative secondary effects associated with adult entertainment establishments in Fulton County. On April 23, 2001, the Eleventh Circuit denied Petitioners' Petition for Rehearing *En Banc*. *See* Pet. App. 44a-45a.

REASONS FOR GRANTING THE WRIT

A content-neutral ordinance such as the one at issue in this Petition does not violate the First Amendment[2] if the ordinance satisfies the four-part test set forth in *United States v. O'Brien*, 391 U.S. 367 (1968):

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id., 391 U.S. at 376-377. The Eleventh Circuit held that the Fulton County Ordinance failed the second prong of this test. *See* Pet. App. 15a-19a. In so doing, the Eleventh Circuit completely changed the appropriate scope of review required by precedents of this Court and the Eleventh Circuit and created a direct conflict with the decisions of several other Circuit Courts of Appeals.

The second part of the *O'Brien* test states that the identified government interest(s) must be important or substantial and

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[2] The First Amendment applies to the states through the Due Process clause of the Fourteenth Amendment to the U.S. Constitution. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489 (n. 1) (1996).

must be furthered by the regulation at issue. *O'Brien*, *supra*, 391 U.S. at 376-377. As set forth in this Court's recent decision in *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296 (2000) and earlier Eleventh Circuit decisions, including *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993, 997 (11th Cir. 1998), *cert. denied*, 529 U.S. 1052 (2000), avoidance of the negative secondary effects identified by Fulton County, including criminal activity, protection of property values, and avoidance of community blight, are undeniably important or substantial. *See* Pet. App. 47a.

However, the Eleventh Circuit held, as a matter of law, that the Fulton County Ordinance failed to "further" the above-referenced, substantial government interests. In reaching this conclusion, the Eleventh Circuit stated that Fulton County could not reasonably choose to rely on studies from other jurisdictions showing negative secondary effects associated with adult entertainment establishments, when studies specific to existing adult establishments in Fulton County did not indicate negative secondary effects associated with those specific establishments. Pet. App. 18a-19a. In other words, the Eleventh Circuit held that the presence of studies failing to show negative secondary effects from the then-existing adult entertainment clubs constitutionally prevented Fulton County from relying on contrary results from foreign-jurisdiction studies as the basis for the content-neutral regulation of both existing and possible future adult entertainment clubs in Fulton County. This holding not only conflicts with precedent in prior decisions of the Eleventh Circuit and other U.S. Circuit Courts of Appeals, but also decides an important federal question in conflict with the decisions of this Court.

I. THE COURT OF APPEALS' DECISION CREATES A CONFLICT AMONG FEDERAL CIRCUIT COURTS OF APPEALS, IN THAT THE THIRD, FOURTH, SEVENTH AND EIGHTH CIRCUITS HAVE HELD THAT LOCAL GOVERNMENTS NEED NOT EXPERIENCE NEGATIVE SECONDARY EFFECTS PRIOR TO ADOPTING ORDINANCES DESIGNED TO PREVENT SUCH EFFECTS.

The rule announced by the Eleventh Circuit in the present case means that Fulton County, as well as any other jurisdiction presented with a lack of evidence that existing adult entertainment clubs have caused negative secondary effects, cannot enact regulations such as that contained in the Fulton County Ordinance. Rather, such a jurisdiction must wait until existing conditions deteriorate to the point that negative secondary effects do result from existing adult entertainment clubs. Not only is there no support for such a proposition in prior decisions of the U.S. Supreme Court or the Eleventh Circuit Court of Appeals—it is also in direct conflict with the decisions of several other U.S. Circuit Courts of Appeals.

DiMa Corporation v. Town of Hallie, 185 F.3d 823 (7th Cir. 1999), *cert. denied*, 529 U.S. 1067 (2000) is directly on point with the present case. In that case, the Seventh Circuit applied negative-secondary-effects analysis to a Hallie ordinance regulating adult bookstores. In support of its claim that such uses result in negative secondary effects, the Hallie ordinance specifically relied only upon another town's ordinance, which in turn had relied upon studies conducted by other cities. *Id.* at 830-831. In contrast, the plaintiff presented contradictory evidence, including specific evidence that its bookstore, "Pure Pleasure", did not cause any of the negative secondary effects Hallie was seeking to address. *Id.*,

at 831. In addressing that evidence and upholding the town ordinance, the Seventh Circuit stated:

> The district court properly rejected [the plaintiff's] evidence because it merely contradicts other evidence that the Hallie Board could reasonably have relied upon. It is therefore irrelevant to the question of whether there is some evidence that does support the Board's conclusions. DiMa's contradictory evidence would be highly probative if our task was to discover the objective truth about the effect of Pure Pleasure's operating in Hallie. But our task under the First Amendment is far different. The Hallie Board has the job of sorting through the available evidence and making a political judgment about what regulations best serve Hallie's interest. We are not here to judge how well the Board did its job; our task is to determine whether the law it enacted violates the Constitution. It does not.

Id. This decision affirmed the Seventh Circuit's long-standing rule on this point. See *Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) ("we agree with the district court that a city need not await deterioration in order to act"); accord, *Cathy's Tap, Inc. v. Village of Mapleton*, 65 F. Supp. 2d 874 (C.D.Il. 1999) (assuming proof that local adult entertainment clubs have not caused negative secondary effects, "there is no requirement that Mapleton await the occurrence of such secondary effects before it enacts legislation designed to prevent them").

At least three other Circuits have reached the same conclusion. In *Wall Distributors, Inc. v. City of Newport News*, 782 F.2d 1165 (4th Cir. 1986), the Fourth Circuit considered a challenge to a city ordinance regulating adult movie arcades. In affirming the ordinance's constitutionality, the Court stated:

> . . . we may not confine the local legislature to only what it knows and can foresee from purely local conditions already experienced. . . . We therefore assess the reasonableness of Newport News' determination not solely on the basis—concededly sparse—of what had already demonstrably occurred within its geographical borders, but of what it might reasonably foresee in light of a sufficiently documented wider national experience properly reflected in matters of public record. . . . To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences before attempting to avoid them.

Id. at 1169, n.7. The language and reasoning of the Fourth Circuit in *Wall Distributors* has also been specifically adopted by the Eighth Circuit. *See Postscript Enterprises v. City of Bridgeton*, 905 F.2d 223, 226-227 (8th Cir. 1990) (quoting at length from *Wall Distributors* in upholding a city ordinance imposing restrictions on adult movie arcades, even in absence of evidence of negative secondary effects caused by plaintiff business and in absence of any record relied upon by city); *Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858, 864 (8th Cir.), *cert. denied*, 513 U.S. 867 (1994) (adult business ordinance constitutional even in absence of evidence of actual secondary effects caused by local adult businesses). *See also ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413, 1418 (8th Cir.), *cert. denied*, 513 U.S. 1017 (1994) ("Under *City of Renton*, Rochester need not prove that [plaintiff's business] would likely have the exact same adverse effects on its surroundings as the adult businesses studied by [the foreign jurisdictions upon whose studies Rochester relied]").

Likewise, the Third Circuit also has held that the First Amendment does not require local evidence of secondary

effects prior to a government's legislative enactment of regulations governing adult entertainment establishments. In *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993), an adult bookstore ("Adult Books") challenged the constitutionality of amendments to Deleware's Adult Entertainment Establishment Act, arguing that Adult Books' particular location and situation constitutionally prevented application of the amendments to its business, "because the amendment's purpose of abating late night noise levels, crime, and sexually offensive materials and activities in residential areas is lacking in Adult Books' particular case." *Id.* at 138. In rejecting this argument, the Third Circuit stated:

> *Renton* indicates that a state legislature considering an ordinance or a statute designed to regulate the incidental undesirable effects of marginally protected expressive activity does not need to survey every adult book store in the state to determine the effect the statute or regulation will have on each. . . . Thus, we agree with the district court's conclusion that the state need not prove that Adult Books' particular ability to disseminate its materials needs restriction in order to prevent the undesirable impact on its neighbors that justified the closing-hours amendment. We think, rather, that *it need only show that adult entertainment establishments as a class cause the unwanted secondary effects the statute regulates.*

Id. (emphasis supplied).

In the present case, Fulton County examined and considered the County studies, the studies from other jurisdictions, and comments made at the public hearing. Based upon the evidence and testimony before it, the Fulton County Board of Commissioners adopted legislation based on nationally-recognized negative secondary effects of adult entertainment establishments, even if local studies did not

find such noticeable effects in Fulton County—a legislative action specifically found valid in the *DiMa Corporation*, *Wall Distributors*, *Postscript Enterprises*, *Ambassador Books* and *Mitchell* decisions. In direct contrast, the Eleventh Circuit prohibits consideration of national studies when potentially flawed local studies exist. Indeed, given the fact that the Board of Commissioners considered evidence of negative secondary effects—in the form of studies from Austin, Indianapolis, Minneapolis, and Los Angeles, as well as testimony offered at its public hearing—the Eleventh Circuit's decision to strike down the Fulton County Ordinance amounts to a substitution of the Court's judgment for the Board of Commissioners' legislative discretion. Because the Eleventh Circuit's decision directly contradicts the conclusions reached on this issue by the Third, Fourth, Seventh and Eighth Circuit Courts of Appeals, this case is proper for the grant of a writ of certiorari.

II. THE COURT OF APPEALS' DECISION CONFLICTS WITH DECISIONS OF THE U.S. SUPREME COURT AND EARLIER DECISIONS OF THE ELEVENTH CIRCUIT, IN THAT THE COURTS HAVE REPEATEDLY UPHELD, AS REASONABLE, A GOVERNMENT'S RELIANCE ON THE TYPE OF EVIDENCE RELIED UPON BY FULTON COUNTY IN THE PRESENT CASE.

A. Legislative Decisions By Local Governments Must Be Given Great Deference.

A local government's "interest in attempting to preserve the quality of urban life is one that must be accorded high respect." *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41, 50 (1986) (quoting *Young v. American Mini Theatres*, 427 U.S. 50, 71 (1976)). Thus, for purposes of the second prong of the *O'Brien* test, the question is not whether the existing adult entertainment clubs actually cause negative secondary effects; rather, the question is whether the "evidence . . .

relie[d] on is reasonably believed to be relevant to the problem the [local government] addresses." *City of Renton, supra*, 475 U.S. at 51-52. It is not the Courts' role to rule on the wisdom of a government's legislative act, and such governments "must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems." *Young*, 427 U.S. at 71. Fulton County examined various studies regarding the negative secondary effects of adult entertainment establishments and exercised its legislative discretion to determine which of these studies applied to the problems it sought to address. This approach conforms to the decisions in *Renton* and *Young*, but is in direct conflict with the Eleventh Circuit's ruling, which effectively replaces Fulton County's discretion with its own. Moreover, other decisions of the Supreme Court and the Eleventh Circuit show that legislative decisions on this issue are to be given great deference, as discussed below.

B. The Fulton County Ordinance Furthered A Substantial Government Interest.

In *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991), the Court held that Indiana's ban on public nudity furthered a substantial government interest, without requiring *any* evidence of how that interest was furthered. 501 U.S. at 569. The Eleventh Circuit's decision in this case points to earlier legislative action by the State of Indiana as proof of furtherance of a governmental interest in *Barnes*. *See* Pet. App. 15a. However, the Eleventh Circuit's reading of *Barnes* confuses two parts of the *O'Brien* analysis: (1) identification of the substantial government interest(s) served by legislation, and (2) whether those interests are furthered by the legislation. While previous Indiana statutes may have identified the governmental interest, the fact remains that there was *no* evidence of how those governmental interests were furthered by the statute at issue in *Barnes*. Indeed, the

Eleventh Circuit simply failed to address its own controlling precedent on this exact point:

> It is clear that under *Barnes*, there is no constitutional requirement that a city make particularized findings regarding the adverse effects of the combination of alcohol and nude entertainment. . . 'It is now established *as a matter of law* by Supreme Court jurisprudence culminating in [*Barnes*] that secondary effects of proscribed conduct may be taken into consideration by a court evaluating the governmental interests justifying impingement upon free speech rights even when, as in *Barnes*, there is *no legislative history* demonstrating that the lawmakers actually considered secondary effects or any other specific factor (such as protecting order and morality) in enacting the challenged law.'

Sammy's of Mobile, 140 F.3d at 997 (n.6) (quoting *Café 207, Inc. v. St. Johns County*, 856 F.Supp. 641, 645 (M.D.Fla. 1994), aff'd. *per curiam*, 66 F.3d 272 (11th Cir. 1995), *cert. denied*, 517 U.S. 1156 (1996))(emphasis supplied). *See also Pap's A.M.*, 529 U.S. at 299 (even *O'Brien* itself, "of course, required no evidentiary showing at all that the threatened harm was real"); *New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981) ("common sense indicates that any form of nudity coupled with alcohol in a public place begets undesirable behavior"); *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121, 1124 (7th Cir. 2001) ("Liquor and sex are an explosive combination"). In addition to showing the substantial deference that the Courts have afforded a local government's legislative determination that a particular enactment furthers a substantial governmental interest, these cases also demonstrate that the actual existence of such negative secondary effects in the government's jurisdiction is immaterial. Thus, the Eleventh Circuit's conclusion that Fulton County possessed no legal authority to adopt the Ordinance in light of the presumed lack

of local negative secondary effects conflicts with *Barnes*, *Paps* and *Sammy's of Mobile*, because those cases demonstrate that reliance on foreign studies is reasonable and satisfies the second prong of the *O'Brien* test.

C. Fulton County's Board Of Commissioners Reviewed Several Forms Of Evidence, Including The County Studies, Studies From Other Local Governments, And Public Comments.

Even in light of the great deference to legislative decisions shown in the above cases, Fulton County did rely upon actual evidence of negative secondary effects. *See* Pet. App. 46a-47a. In addition, Fulton County specifically found studies from other jurisdictions to be relevant to the problems it wished to prevent. *See* Pet. App. 47a. The law is clear that Fulton County may properly, and constitutionally, rely on such studies performed by other local governments. *See, e.g.*, *Pap's A.M.*, 529 U.S. at 296-297; *City of Renton*, 475 U.S. at 51-52; *Sammy's of Mobile*, 140 F.3d at 997.

In its holding that Fulton County's reliance on foreign studies was unreasonable as a matter of law, the Eleventh Circuit relied upon *Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir. 1985). Unlike the situation in the present case, the *only* evidence in the record in *Krueger* was that the existing adult entertainment clubs in Pensacola did not have significant crime problems. *Id.* at 855. Pensacola had not considered any evidence from other jurisdictions. *Id.* In that case, the Eleventh Circuit announced the standard that the local government must show "that the articulated concern had more than merely speculative factual grounds . . . ." *Id.*

Fulton County's Board of Commissioners considered the testimony of its constituents and the adult entertainment industry, studies from other jurisdictions and the County

Studies. Thus, contrary to the Eleventh Circuit's conclusion, Fulton County obviously has met the standard announced in *Krueger*—its concern regarding negative secondary effects was based on more than mere speculation. *See also Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943, 949 (11th Cir.), *cert. denied*, 459 U.S. 859 (1982) (government must have "some factual basis" for claim that adult uses cause negative secondary effects); *Ranch House, Inc. v. Amerson*, 238 F.3d 1273, 1283 (11th Cir. 2001) (second prong of the *O'Brien* test requires at least "some kind of minimal evidentiary showing, even if that showing consists of nothing more than proof that the legislature reasonably relied on findings reported elsewhere suggesting a link between the proscribed expression and negative secondary effects").

D. The Eleventh Circuit Adopted A New Standard That Encourages Local Governments To Avoid Local Studies.

In contravention of the binding authority discussed above, the Eleventh Circuit adopted a new standard in the present case: that, as a matter of law, foreign studies cannot be relied upon where evidence shows that negative secondary effects arguably do not exist with respect to existing adult entertainment clubs in the jurisdiction in question. *See* Pet. App. 18a, 19a. In other words, some evidence is more important than—and prevents reliance upon—other evidence.[3] In sum, the Eleventh Circuit held that the

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[3] Putting the point more bluntly, the Eleventh Circuit stated that the Respondents "challenged and disproved the Board [of Commissioners]'s findings." *See* Pet. App. 16a. In addition to conducting constitutional fact finding (a point seemingly conceded by the Eleventh Circuit; *see* Pet. App. 18a), this statement simply is erroneous. The Respondents' evidence did not disprove Fulton County's finding of negative secondary effects associated with adult uses, as gleaned from the foreign-jurisdiction studies; rather, it simply presented additional, separate data that there was a lack of evidence of certain negative secondary effects associated with the Fulton County adult entertainment clubs during the studied period.

existence of such local data means that the legislative body cannot consider and rely upon studies from foreign jurisdictions. There is simply no authority for this proposition. Rather, as specifically authorized by cases such as *Pap's A.M.* and *City of Renton*, Fulton County considered the evidence presented to it and chose, in its legislative discretion, to rely on the studies from other jurisdictions in an effort to prevent the development of the negative secondary effects that those other jurisdictions had found to be connected to adult uses.

The Eleventh Circuit's decision in the present case obviously alters the standard set forth in the above cases. For the first time, the Eleventh Circuit has announced a rule that the presence of one type of evidence prevents a government's reliance on other evidence. This decision has substantial implications for local governments and their legislative bodies, in that the Eleventh Circuit's decision necessarily entails that a legislative body loses its discretion to legislate in this area if it is presented with evidence of an absence of negative secondary effects caused by existing adult uses in that legislative body's jurisdiction.[4] If the Eleventh Circuit's decision stands, local governments would have an incentive to avoid conducting studies in their own jurisdictions, choosing to rely only on foreign-jurisdiction studies. Such a result is obviously at odds with the fully informed decision-making process to be encouraged in the legislative arena.

More importantly, the obvious result of the Eleventh Circuit's decision is that local governments may only act

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Thus, the County Studies simply were included within the facts from which Fulton County made a legislative decision.

[4] Following the Eleventh Circuit's reasoning to its logical conclusion, a local government that has *no* existing adult entertainment establishments would also be constitutionally prevented from adopting prospective regulations of such establishments, because, obviously, there would be no local negative secondary effects authorizing the government to act.

reactively, not proactively. Such governments would be unable to legislate for their county or city as a whole, as has Fulton County, but rather must await specific evidence of problems with *existing* adult entertainment establishments. Such a rule would substantially redefine this Court's earlier statements regarding the second prong of the *O'Brien* test, as set forth in cases including *Pap's A.M.* and *Barnes*. In contrast to the Eleventh Circuit's decision, those Supreme Court cases hold that Courts must defer to a local government's legislative discretion whenever evidence exists to support that discretionary decision. In this case, the Eleventh Circuit has disallowed consideration of entire categories of legislative evidence and, because of this conflict with controlling precedent of this Court, Fulton County respectfully submits that this is a proper case for grant of a writ of certiorari.

III. THIS COURT GRANTED CERTIORARI IN A SIMILAR CASE, IN WHICH THE NINTH CIRCUIT HELD A LOS ANGELES ADULT-USE ORDINANCE UNCONSTITUTIONAL BE-CAUSE OF PERCEIVED SHORTCOMINGS IN THE EVIDENCE OF NEGATIVE SECOND-ARY EFFECTS RELIED UPON BY THE CITY OF LOS ANGELES.

This Court recently granted certiorari in *Alameda Books, Inc. v. City of Los Angeles*, 222 F.3d 719 (9th Cir. 2000), *cert. granted*, __ U.S. __, 121 S.Ct. 1223 (March 5, 2001) (S.Ct. Docket No. 00-799). In that case, the Ninth Circuit held unconstitutional a Los Angeles ordinance amendment that prohibited the combination of adult-oriented uses in the same establishment.[5] 222 F.3d at 720-721. As justification

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[5] The fact that *Alameda Books* involves a zoning/location regulation, as opposed to the alcohol restriction at issue in the present case, does not alter its applicability to the present case. *See, e.g., Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 298 (1984); *Barnes*, 501 U.S. at

for that ordinance, the City pointed to a 1977 study of the effects of concentration of adult businesses in a given geographic area; that study had been used in conjunction with the original adoption of the ordinance in question. *Id.* The Ninth Circuit held the ordinance unconstitutional because the 1977 study did not specifically examine the effects of combinations of adult uses within one business location; accordingly, the City had no evidence supporting a conclusion that negative secondary effects were produced by such combined uses. *Id.* at 725. In other words, according to the Ninth Circuit, the City had no evidence from which to reasonably conclude that its ordinance served the identified governmental interests. *Id.* In reaching its conclusion, the Ninth Circuit was required to distinguish or decline to follow conflicting rulings from the Third, Fourth and Eighth Circuit Courts of Appeals. *Id.* at 727-728; *see ILQ Investments, Inc. v. City of Rochester*, 25 F.3d 1413 (8th Cir.), *cert. denied*, 513 U.S. 1017 (1994); *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123 (3rd Cir. 1993); *Hart Book Stores, Inc. v. Edmisten*, 612 F.2d 821 (4th Cir. 1979), *cert. denied*, 447 U.S. 929 (1980). In agreeing to review the Ninth Circuit's decision, this Court has specifically posed a certiorari question related to the sufficiency of the evidence of negative secondary effects relied upon by the City of Los Angeles. Because the same issue is involved in the present case, Fulton County respectfully submits that the instant action is a proper case for the grant of a writ of certiorari to the Eleventh Circuit Court of Appeals.

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566 (*Renton* analysis "embod[ies] much the same standards as those set forth in *United States v. O'Brien*"); *Mitchell v. Commission on Adult Entertainment Establishments*, 10 F.3d 123, 131, n. 7, (3rd Cir. 1993) ("regardless of whether the analytical framework of *O'Brien* or *Renton* is applied . . ., the result would be the same"). This point has apparently been conceded by Respondents, whose counsel argued to the Eleventh Circuit that *Alameda Books* is directly on point in the present case.

CONCLUSION

For the reasons discussed above, the Court of Appeals incorrectly applied the second prong of the *O'Brien* test to the Fulton County Ordinance, in conflict with prior decisions of the United States Supreme Court, the Eleventh Circuit itself, and the Third, Fourth, Seventh and Eighth Circuit Courts of Appeals. This Eleventh Circuit decision substantially threatens the concept of legislative discretion for local governments in this area—a principle recognized time and again in earlier court decisions—and places the courts of the Eleventh Circuit in the role of weighing legislative evidence against other evidence in an effort to determine what is "reasonable". Because of the Eleventh Circuit's incorrect application of existing Supreme Court precedent and the conflict this decision creates with decisions of other Circuit Courts of Appeals, Fulton County respectfully requests that this Court review the Eleventh Circuit's decision by issuance of a writ of certiorari to that Court.

Respectfully submitted,

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APPENDICES

APPENDIX A

[Filed Feb 20, 2001]

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11152
D.C. Docket No. 98-02441-CV-GET-1

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA,
d.b.a. Mardi Gras,
Plaintiff-Appellant,

versus

FULTON COUNTY, GEORGIA and FULTON COUNTY BOARD OF COMMISSIONERS, in their Individual and Official Capacities,
Defendants-Appellees.

6420 ROSWELL ROAD, INC., d.b.a. Flashers, a Georgia Corporation, HARRY FREESE, Individually and as Licensee for Flashers, FANNIES, INC., and WILLIAM H. PARKS, JR., Individually and as Owner of Fannies,
Plaintiffs-Appellants,

versus

FULTON COUNTY, GEORGIA and FULTON COUNTY BOARD OF COMMISSIONERS, in their Individual and Official Capacities,
Defendants-Appellees.

CEEDA ENTERPRISES, INC.
d.b.a Riley's Restaurant and Lounge,
Plaintiff-Appellant,

versus

FULTON COUNTY, GEORGIA and FULTON COUNTY BOARD OF COMMISSIONERS, in their Individual and Official Capacities,
Defendants-Appellees.

Appeals from the United States District Court
For the Northern District of Georgia

February 20, 2001

Before DUBINA, FAY and COX, Circuit Judges.

PER CURIAM:

Plaintiffs, four adult entertainment businesses ("Plaintiffs") operating in unincorporated Fulton County, Georgia appeal from the grant of summary judgment in favor of defendants Fulton County and its Board of Commissioners. The district court held that a 1997 amendment to Section 18-76 of the Fulton County Code ("Section 18-76" or "1997 amendment") which prohibited the sale and consumption of alcoholic beverages in adult entertainment establishments was constitutional as a matter of law. The district court found that the 1997 amendment operated as a content-neutral restriction that furthered the government's interest in preventing negative secondary effects associated with adult entertainment businesses, and denied Plaintiffs' claims based on due process, prior restraint, and contract impairment. On appeal, Plaintiffs contend that the amendment to Section 18-76 fails to further the government's purported concern because local studies show no evidence of negative secondary effects connected with Plaintiffs' clubs. Plaintiffs also contend that Defendants' conduct in passing the 1997 amendment violated due process, that the amendment impairs their contractual obligations, and that the district court erred in declining to reach the merits of their prior restraint claim. We hold that the 1997 amendment fails to further Defendants' purported concern with negative secondary effects, and accordingly REVERSE IN PART and AFFIRM IN PART the district court's grant of summary judgment.

I. Background Facts

In considering whether to amend Section 18-76, the Fulton County Board of Commissioners ("Board") passed a resolution directing the Fulton County Police Department, the County Attorney, and the Department of Planning and Economic Development (collectively "Fulton County staff") to conduct a study on the secondary effects of alcohol consumption in adult entertainment establishments located in Fulton County. *See* Fulton County, Ga., Resolution Relating to Regulation of Alcohol Consumption in Adult Entertainment Establishments (Apr. 16, 1997). The Board also directed Fulton County staff to assemble similar studies from foreign jurisdictions ("foreign studies"). The resolution stated that the Board had reason to believe that consumption of alcoholic beverages in adult entertainment establishments contributed to increased crime and decreased real property values. The resolution further stated the Board's intent "to enact, if warranted by said studies, a carefully tailored regulation to minimize the negative secondary effects of the serving and consumption of alcoholic beverages at adult entertainment establishments. . . ."

On June 13, 1997, the Fulton County Police Department completed a study concerning the number of calls for police assistance and the number and types of crimes occurring in the vicinity of twelve drinking establishments: six that featured adult entertainment and six that did not. *See* Study of Calls for Service to Adult Entertainment Establishments Which Serve Alcoholic Beverages (June 13, 1997). The study concluded that, for the time period January 1, 1995 through May 31, 1997, there was no statistical correlation showing an increase in crime at adult entertainment establishments that served alcoholic beverages. Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages.

In or about June 1997, the six Fulton County adult entertainment establishments ("the Clubs"), four of which are owned by Plaintiffs, commissioned Land Development Analysts, Inc. ("LDA, Inc.") to conduct a study of the Clubs' economic impact on their surrounding environs. Specifically, LDA, Inc. sought to identify negative impacts, if any, on the business volumes, rental rates and property values of surrounding properties. The study revealed high occupancies and rental rates in existing buildings, expensive improvements, business expansions, turn-away business volume and proposed development in the Clubs' vicinities. *See* Economic Impact Study, Six Locations in Three Neighborhoods, Fulton County, Georgia (June 1997). LDA, Inc. could not identify any detrimental impacts as caused by the Clubs.

In response, the Board of Commissioners retained its own appraiser, Dabney & Associates ("Dabney"), to inspect the subject properties and to review the economic impact study prepared by LDA, Inc. The Dabney report claimed several weaknesses with the aforementioned study, but determined that the report's weaknesses did not invalidate it's conclusions.[1] The Dabney report found that LDA, Inc.

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[1] The Dabney report posited that: (1) LDA, Inc.'s use of broad neighborhoods may have eclipsed adverse impacts in the Clubs' immediate areas; (2) the failure to use control neighborhoods precluded evidence that increasing market values might have reached even higher levels without the presence of adult entertainment establishments; and (3) the failure to define key underlying terms, specifically "blight," resulted in undue focus on market conditions that may not directly relate to maintenance of surrounding properties, *see also, infra*, n.2. The Dabney report also criticized LDA, Inc. for failing to detail the results of services it claimed to have performed, such as to review demographic and economic trends, to identify the highest and best use of properties, and to review existing and proposed zoning changes. Because this data did not relate to blight, or a lack of maintenance in and around the Clubs, the Dabney report stated that such omission did not invalidate the conclusions of LDA, Inc.

gathered appropriate data and arrived at reasonable conclusions. Based on the market data provided by LDA, Inc., Dabney found that the Clubs had caused no diminution of property values or rents. *See* An Administrative Review of An Economic Impact Study of Six Locations In Three Neighborhoods, Fulton County, Georgia dated August 7, 1997. Dabney personally observed that none of the subject properties or those around them showed a lack of maintenance.[2] The Clubs bore restrained identification signs, and Dabney found it difficult even to identify two of the Clubs as adult entertainment establishments. Thus, the Dabney report drew similar to identical conclusions to that of LDA, Inc., i.e., that the Clubs had caused no quantifiable "blight" upon their environs.

The Board held two public meetings, on November 19, 1997, and on December 17, 1997, to consider the amendment. At the first public meeting, the Board considered the following: (1) foreign studies collected by Fulton County staff; [3] (2) the LDA, Inc. study; (3) the Fulton County Police study; (4) and the Dabney report. The Board also received public comments and permitted counsel for Plaintiffs fifteen minutes each to present their position regarding the proposed amendment and the relevant studies.

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[2] Noting that THE DICTIONARY OF REAL ESTATE APPRAISAL defines "blight" as a failure to maintain the quality of real estate, Dabney focused on maintenance as a key element contributing to blight. The Dabney report criticized LDA, Inc. for neglecting to directly consider maintenance, but concluded that LDA, Inc. presented information about the Clubs' surrounding areas that might serve as proxies for "maintenance" both in an economic sense and general physical sense.

[3] The foreign jurisdictions studies included: (1) City of Austin, Texas Report; (2) Analysis of Adult Entertainment Businesses in Indianapolis, Indiana; (3) Analysis of the Relationship Between Adult Entertainment Establishments, Crime, and Housing Values in Minneapolis; and (4) Study of the Effects of the Concentration of Adult Entertainment Establishments in the City of Los Angeles.

On December 17, 1997, at the second public hearing, the Board met and approved the amendment to Section 18-76. The 1997 amendment prohibits the serving, offering or consuming of any alcoholic beverages on the premises of an adult entertainment licensee.[4] The preamble to the ordinance provides the Board's justification for the amendment:

> . . . WHEREAS, in a public hearing held November 19, 1997, the Board of Commissioners heard testimony and received studies from its staff, the public, and from representatives of the adult entertainment industry concerning negative secondary effects connected with adult entertainment facilities where alcoholic beverages are consumed, and live nude, or partially nude, performances are presented;
>
> WHEREAS, based upon the experience of other urban counties and municipalities, which experiences the Board of Commissioners finds are relevant to the problems faced by Fulton County, Georgia, and which do not vary greatly among generally comparable communities within this country, the Board of Commissioners finds that public nudity, under certain circumstances, particularly circumstances related to the

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[4] Section 18-76 "Rules for Operation" now states that:

> Any person, firm partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:
>
> . . .
>
> (7) No licensee shall permit any alcoholic beverages to be served, offered, or consumed on the premises.
>
> Violations of these rules and regulations may result in revocation of the license.

Fulton County, Ga., Code § 18-76 (1997) (effective Jan. 1, 1998, provided that adult entertainment facilities holding adult entertainment licenses on Dec. 17, 1997, shall not be subject until Dec. 31, 1998).

sale and consumption of alcoholic beverages in adult entertainment facilities offering live entertainment, begets criminal behavior and tends to create undesirable community conditions;

WHEREAS, among the undesirable community conditions identified with live nude entertainment and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior herein above described, and acceleration of community blight by the concentration of such establishments in particular areas;

WHEREAS, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare, and it is a matter of government interest and concern to prevent the occurrence of criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow or encourage nudity;

. . . .

Ordinance Amending Fulton County, Ga., Code § 18-76 (Dec. 17, 1997).

II. Procedural History

On August 25, 1998, plaintiff Flanigan's Enterprises, Inc. of Georgia, d/b/a Mardi Gras ("Mardi Gras") filed a civil action in the District Court for the Northern District of Georgia seeking declaratory and injunctive relief and monetary damages. The civil action names Fulton County, a political subdivision of the State of Georgia, and the Fulton County Board of Commissioners, individually and in their official capacities, as defendants (collectively "Defendants"). On October 5, 1998, plaintiff CEEDA Enterprises, d/b/a Riley's Restaurant and Lounge ("Riley's") and plaintiff 6420

Roswell Road, Inc. d/b/a Flashers, Harry Freese, Fannies, Inc., and William H. Parks, Jr. ("Flashers and Fannies") filed suit against the same Defendants. The complaints, filed pursuant to 42 U.S.C. § 1983, seek a declaration that Section 18-76, as amended, operates as an impermissible prior restraint and violates the free speech clause of the First Amendment, the takings clause of the Fifth Amendment, the equal protection clause, and both the substantive and procedural guarantees of the due process clause of the Fourteenth Amendment. The complaints further seek a permanent injunction prohibiting the enforcement of this provision against the Plaintiffs, and damages for condemnation, intentional interference with business relations, and breach of contract.

The district court, Hon. G. Ernest Tidwell, consolidated the three cases by agreement of the parties. On February 4, 2000, the district court entered summary judgment in favor of the Defendants on all claims.[5] Relying on *Sammy's*[6], the district court determined that an ordinance prohibiting nude dancing in establishments licensed to sell liquor constitutes a content-neutral law subject to intermediate scrutiny under *O'Brien*.[7] The district court concluded that Section 18-76 was constitutional as a matter of law because, like the ordinance in *Sammy's*, Section 18-76 was amended to prevent negative secondary effects related to nude dancing, and therefore,

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[5] In all three cases, the Plaintiffs filed separate briefs in response to Defendants' motion for summary judgment. However, the district court addressed each argument as it related to the Plaintiffs as a group because each plaintiff incorporated the briefs and arguments of the other plaintiffs. We employ the same approach because Plaintiffs have incorporated each others' Briefs on appeal.

[6] *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir.1998), *cert. denied*, 529 U.S. 1052, 120 S. Ct. 1553, 146 L. Ed. 2d 459 (2000).

[7] *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

furthered a substantial government interest unrelated to free expression. The court reasoned that the experience of other urban areas provided the requisite factual basis for the Board's stated justification that nude dancing begets criminal behavior and tends to create undesirable community conditions. Moreover, the district court rejected Plaintiffs' arguments that the Board, in the face of contradictory local studies, unreasonably relied on outdated and foreign studies that focused on the location of adult entertainment businesses rather than the relationship between alcohol and live nude entertainment.

With respect to the Plaintiffs' due process challenge, the district court found that the Defendants' actions in amending Section 18-76 constituted legislative action because the amendment applies generally to all adult entertainment establishments existing now or created in the future. However, even if the 1997 amendment could be characterized as adjudicative in nature, the Clubs did not have a vested right in the renewal of their adult entertainment and liquor licenses because section 18-42 of Article II of the Fulton County Code requires annual registration in accordance with Article II, and the Clubs did not have a vested right in the law never changing.[8] Moreover, the district court found that Plaintiffs were given sufficient due process, i.e., notice of the proposed legislation, time to state their concerns and to submit their own studies at the first public hearing.

The district court did not address the merits of the Plaintiffs' claim that Section 18-76 operates as an invalid prior restraint. The district court found that such a claim was not adequately set forth in the pleadings, and therefore, was untimely raised for the first time in response to the

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[8] As the district court found that the Clubs did not have a vested right in the renewal of their licenses, Plaintiffs' claim for just compensation pursuant to the Fifth and Fourteenth Amendments also failed as a matter of law. Plaintiffs do not contest this finding on appeal.

Defendants' motion for summary judgment. Finally, the district court determined that even if the amendment to Section 18-76 impaired the Clubs' contractual leases, the amendment constituted a necessary exercise of the county's police power in order to prevent the negative secondary effects related to the sale and consumption of alcohol in adult entertainment establishments.

On February 22, 1997, Plaintiffs filed a motion for reconsideration, and on March 3, 1997, the Plaintiffs timely filed a Notice of Appeal. On March 27, 1997, the district court entered an order denying the Plaintiffs' motion to reconsider the order granting summary judgment to the Defendants on all counts. Plaintiffs thereafter proceeded with the present appeal.

III. Discussion

We review a district court's grant of summary judgment de novo, applying the same standards as the district court. *See Harris v. H&W Contracting Co.*, 102 F.3d 516, 518 (11th Cir.1996). We will affirm the district court if the record demonstrates there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. *See Fernandez v. Bankers Nat'l Life Ins. Co.*, 906 F.2d 559, 564 (11th Cir.1990).

A. Freedom of Expression

The Supreme Court has recently reaffirmed that nude dancing of the type at issue here is expressive conduct that falls within the outer ambit of the First Amendment's protection. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 120 S. Ct. 1382, 1391, 146 L. Ed. 2d 265 (2000) (*citing Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 565-566, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (plurality opinion)); *see also Schad v. Mount Ephraim*, 452 U.S. 61, 66, 101 S. Ct. 2176, 68 L. Ed. 2d 671 (1981). Thus, municipal ordinances like the one at issue that regulate nude dancing are subject to constitutional scrutiny.

1. Establishing the Proper Standard of Review

To determine what level of scrutiny applies, we must decide "whether the State's regulation is related to the suppression of expression." *Pap's*, 120 S. Ct. at 1391 (*quoting Texas v. Johnson*, 491 U.S. 397, 403, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)). If the governmental purpose in enacting the regulation is unrelated to the suppression of expression, then the regulation need only satisfy intermediate scrutiny under *O'Brien*. *Pap's*, 120 S. Ct. at 1391 (citing cases). If the government interest is related to the content of the expression, however, then the regulation falls outside the scope of the O'Brien test and must be subjected to strict scrutiny. *Id.* Thus, the principal inquiry in determining content neutrality is whether the government has adopted a regulation of speech because of disagreement with the message it conveys or if it is justified without reference to the content of regulated speech. *Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (1989).

In *Pap's*, the Supreme Court held that a municipal ordinance banning all public nudity, as applied to establishments that offered nude dancing, was content-neutral. *Pap's*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265. The Court reasoned that the city of Erie's asserted interest in combating negative secondary effects associated with adult entertainment establishments was unrelated to the suppression of the erotic message conveyed by nude dancing. *See id.* As in *Pap's*, the preamble to Section 18-76 expressly states that the 1997 amendment was intended to target the negative secondary effects associated with adult entertainment establishments. Therefore, the Defendants' purpose in prohibiting nude dancing in establishments licensed to sell liquor is not related to the suppression of any erotic message conveyed by nude dancing.

Plaintiffs Fannies and Flashers argue that the amendment to Section 18-76 is distinguishable from the ordinance at issue in *Pap's* because Fulton County is not attempting to ban all public nudity. See *Pap's*, 120 S. Ct. at 1391 (reasoning that the ordinance "does not target nudity that contains an erotic message; rather, it bans all public nudity, regardless of whether that nudity is accompanied by expressive activity"). Fannies and Flashers contend that Section 18-76 is content-based because it only bans nude dancing in establishments licensed to sell alcoholic beverages. Similarly, they claim that Section 18-76 treats live nude dancing differently from non-live nude dancing and, therefore, is content-based because it favors one message over another. If the combustible nature of nudity and alcohol were truly the problem Defendants sought to correct, Fannies and Flashers assert that the Board would have enacted a general ban on nudity. *See Pap's*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265; *Barnes*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504.

First, this circuit has specifically held that a city ordinance prohibiting nude dancing in establishments licensed to sell liquor is content-neutral and therefore, subject to review under the O'Brien test. *See Sammy's of Mobile, Ltd., v. City of Mobile*, 140 F.3d 993, 996 (11th Cir.1998), cert. denied, 529 U.S. 1052, 120 S. Ct. 1553, 146 L. Ed. 2d 459 (2000).[9] We have subsequently reaffirmed this holding, guided by *Pap's*, reasoning that regulations targeting undesirable secondary effects of adult entertainment establishments that

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[9] The Clubs argue that the ordinance at bar is distinguishable from that in Sammy's because Fulton County did not rely on the Twenty-first Amendment in amending the ordinance. However, the district court correctly found that "[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations." *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996). This power is located in the inherent police power of every state to regulate to promote public decency. *Id.*

serve alcoholic beverages are unrelated to the suppression of the erotic message conveyed by nude dancing. *Artistic Entertainment, Inc. v. City of Warner Robins*, 223 F.3d 1306, 1309 (11th Cir.2000) (explaining that ordinance's express purpose was to reduce criminal activity and "other undesirable community conditions"); *Wise Enterprises, Inc., v. Unified Government of Athens-Clarke County*, 217 F.3d 1360, 1363-64 (11th Cir.2000) (reproducing ordinance providing that combination of public nudity in combination with the sale and consumption of alcoholic beverages "begets criminal behavior and tends to create undesirable community conditions").

Second, the Supreme Court has recognized that a regulation is not necessarily content-based simply because on its face it distinguishes among types of speech based on their content. *See Renton v. Playtime Theatres*, 475 U.S. 41, 46-48, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986). In *Renton*, the plaintiff argued that the ordinance was content-based because it treated theaters that specialized in adult films differently from other kinds of theaters. However, the Court applied intermediate scrutiny reasoning that the ordinance was aimed not at the content of the films shown at the adult motion picture theaters, but rather at the secondary effects of such theaters on the surrounding community. Here, as in *Renton*, the Board's predominate concern, as manifested in the preamble of Section 18-76, was the secondary effects of nude dancing combined with the consumption of alcoholic beverages, not at the message conveyed by nude dancing. Accordingly, we find that amended Section 18-76 is content-neutral and review the Fulton County ordinance pursuant to the test set forth in *O'Brien*.

2. Applying the O'Brien test

Under *O'Brien*, an ordinance is valid if: (1) it serves a substantial interest within the power of the government; (2) the ordinance furthers that interest; (3) the interest served

is unrelated to the suppression of free expression; and (4) there is no less restrictive alternative. *See O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679. Defendants assert that Section 18-76 was amended to prevent the occurrence of criminal behavior and undesirable community conditions, specifically identified in the preamble as depression of property values, increased crime, and acceleration of community blight. Such interests are substantial government interests that satisfy the first part of the O'Brien test. *See, e.g., Pap's* (applying O'Brien test to city of Erie's prohibition on public nudity and finding that stated interest in combating secondary effects related to nude dancing is clearly within city's police powers to protect public health and welfare).

Section 18-76 also satisfies the third and fourth prongs of the O'Brien test. *See O'Brien*, 391 U.S. at 377, 88 S. Ct. at 1679. Both our court and the Supreme Court have expressly held that an ordinance focusing on the secondary effects associated with the combination of nude dancing and alcohol consumption is unrelated to the suppression of free expression. *See Pap's*, 120 S. Ct. at 1393 (stating that the government's interest in combating harmful secondary effects is not related to the suppression of expression); *accord Wise Enterprises, Inc.*, 217 F.3d 1360, 1364.[10] Moreover, such a restriction on First Amendment rights is no greater than necessary to further the government's interest, as required under the fourth prong of the O'Brien test. *See Pap's*, 120 S. Ct. at 1397 (concluding that, in order to comply with ordinance, requirement that dancers wear pasties and G-strings leaves ample capacity to convey the dancer's erotic message); *Wise Enterprises, Inc.*, 217 F.3d at 1365 (reasoning that ordinance does not prohibit all nude dancing, but only in those locations where the unwanted secondary effects arise).

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[10] Although the Plaintiffs contend that Section 18-76 fails to meet this factor, they present no evidence that Fulton County passed the ordinance to hinder the communicative aspects of such conduct.

The second prong of the O'Brien test, however, states that the regulation must further an important government interest. *See O'Brien*, 391 U.S. at 376, 88 S. Ct. 1673. The avoidance of criminal activity, protection of property values, and avoidance of community blight are undeniably important. *See Pap's*, 120 S. Ct. at 1395 (stating that asserted interest in combating secondary effects associated with nude dancing are undeniable important). However, it is less clear whether Section 18-76 furthers the Defendants' stated interest in preventing the occurrence of negative secondary effects associated with the types of businesses operated by Plaintiffs.

In order to meet their burden under this element, the Defendants must have "some factual basis for the claim that [adult] entertainment in establishments serving alcoholic beverages results in increased criminal activity" and other undesirable community conditions. *Grand Faloon Tavern, Inc. v. Wicker*, 670 F.2d 943 (11th Cir.1982) (upholding county ordinance prohibiting nude and semi-nude entertainment in establishments licensed to sell liquor where city commissioners had evidence that substantial criminal activity took place in topless bars). In terms of demonstrating that such secondary effects pose a threat, the city need not "conduct new studies or produce evidence independent of that already generated by other cities . . . so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses." *Pap's*, 120 S. Ct. at 1395 (*quoting Renton*, 475 U.S. 41, 51-52, 106 S. Ct. 925, 89 L. Ed. 2d 29 (1986)). In *Barnes*, for example, the Court determined that Indiana's public indecency statute reflected moral disapproval of people appearing nude in public, and found evidence in a long line of public indecency laws, dating from 1831, that the statute furthered the government's interest in protecting order and morality. *See Barnes*, 501 U.S. 560, 567-68, 111 S. Ct. 2456, 2460-62, 115 L. Ed. 2d 504. In *Pap's*, the Supreme Court held that Erie city council members could reasonably rely on the experience

of other cities, in addition to their own first-hand knowledge, as evidence that the same kind of nude dancing was likely to produce the same secondary effects. *See Pap's*, 120 S. Ct. at 1395. Thus, we find no basis for Defendants' contention that, pursuant to *Pap's* and *Barnes*, we may presume the evidence needed to meet the second prong of the O'Brien test.[11]

Our own cases demonstrate that we require some reasonable justification for legislation which suppresses, albeit incidentally, protected expression.[12] *See Sammy's*, 140 F.3d at 997 (relying upon the experience of other cities, foreign studies, case law reciting findings, as well as the officials' own wisdom and common sense); *Wise Enterprises, Inc.*, 217 F.3d at 1364 (experience of other cities, foreign studies, and a local police report documenting police visits to adult entertainment establishments). In this case, the Board amended Section 18-76 of the adult entertainment ordinance because it was concerned that adult entertainment facilities caused (a) depression of property values; (b) increase in crime and expenditures related thereto; and (c) neighborhood blight. *See* Preamble to Ordinance Amending Section 18-76. Unlike in *Pap's* and *Sammy's*, where the plaintiffs never challenged the cities' findings, the Fulton County Clubs challenged and disproved the Board's findings. The evidence in the record relating to conditions in Fulton County shows unequivocally that property values in neighborhoods adjoining the Clubs

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[11] For example, Defendants contend that the Supreme Court in *Barnes* upheld Indiana's ban on public nudity without requiring any evidence of how the government's interest was furthered. In fact, the Court found it difficult to discern what governmental interest the legislation served because Indiana does not record legislative history. However, the Court found that the history of Indiana's public indecency statute, dating from 1831, evinced that the statute furthered the government's interest in protecting societal order and morality.

[12] Although we might disagree that nude dancing contains any expression protected by the First Amendment, the test has been given us. We will not merely go through the motions of applying it.

have increased during the time the Clubs have been in existence, and that surrounding buildings show no signs of blight, or lack of physical maintenance. Moreover, the Fulton County police study found greater reported crime connected with establishments that served alcohol but did not feature adult entertainment. In other words, local studies commissioned both by the Clubs and the Board found no evidence of the secondary effects with which the Board was purportedly concerned. The question thus becomes, was it reasonable for Defendants to ignore relevant local studies and rely instead upon remote foreign studies in determining whether adverse secondary effects were attributable to the Fulton County Clubs?

We do not think that Defendants had any reasonable justification for amending Section 18-76 when the county's own studies negated the very interests it purportedly sought to prevent. *See Krueger v. City of Pensacola*, 759 F.2d 851 (11th Cir.1985). In *Krueger*, we stated that where the right to free speech is at issue, the government bears the burden of showing that the articulated concern has more than merely speculative factual grounds, and that it was actually a motivating factor. *See id.* at 855. Thus, in that case, we held unconstitutional a city ordinance which banned nudity in establishments that served alcoholic beverages because the city failed to produce any evidence of a crime problem, the city's purported justification in passing the ordinance. *Id.; cf. Grand Faloon Tavern*, 670 F.2d 943, 950 (report of police calls and testimony of police officers concerning crime associated with nude entertainment provided necessary link between stipulated purpose of the ordinance and the problems justifying it). We recognize that a governmental entity is not required to perform empirical studies. *See Pap's*, 120 S. Ct. at 1395. However, having done so, the Board cannot ignore the results. Local studies, including those commissioned by the county itself, revealed that the Clubs had less, up to half, the incidence of crime than establishments that did

not offer nude dancing, property values had increased in the Clubs' surrounding neighborhoods, and the physical maintenance of surrounding buildings showed no quantifiable blight. Accordingly, we find that it was unreasonable for Defendants to rely on remote, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were not relevant to local conditions.[13]

The case might be different were the Clubs a recent addition to Fulton County neighborhoods. It is undisputed, however, that Plaintiffs have continually operated these adult entertainment establishments for nearly a decade.[14] We realize that our decision today appears to result in constitutional fact finding, in which the constitutionality of an ordinance will depend on local conditions. However, we have no choice; we are bound by the decisions of the Supreme Court and the law of our circuit. To be sure, Defendants may respond by enacting a ban on all public nudity; the Supreme Court has upheld that. *See Pap's*, 529 U.S. 277, 120 S. Ct. 1382, 146 L. Ed. 2d 265; *see also Barnes*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504. However, Defendants may not ban nude dancing in establishments licensed to sell liquor without any factual basis to support the claim that these establishments are connected with negative secondary effects.

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[13] Given our decision, we need not address the Plaintiffs' argument that the foreign studies relied upon by Defendants do not examine the connection between drinking and nude dancing, and secondary effects. *Cf. Diva's, Inc. v. City of Bangor*, 21 F. Supp. 2d 60 (D.Me.1998) (holding unconstitutional ordinance enacted in reliance on foreign studies which focused only on efficacy of land use and zoning schemes in reducing crime).

[14] In their Reply Brief to the Motion For Summary Judgment, Defendants concede that Mardi Gras has continually operated an adult entertainment establishment in Fulton County since 1992, Flashers since 1991, Fannies since 1984, and Riley's since 1983.

We reiterate that, to satisfy the O'Brien test, the county must demonstrate that it reasonably relied upon evidence relevant to the problem that it addresses. *See Pap's*, 120 S. Ct. at 1395. We simply cannot find it reasonable for a government entity to conduct studies on specific areas and then to reject the conclusions thereof in favor of studies from different cities and different time periods. Accordingly, we hold that Section 18-76 is unconstitutional under the O'Brien test because the ordinance fails to further the professed government interests.

B. Due Process

Plaintiffs Flashers and Fannies contend that Section 18-76, as amended, deprives the Clubs of a vested property right in their alcoholic beverage and adult entertainment licenses in violation of due process of law. U.S. Const. Amend. XIV, § 1. They assert that the Clubs have a vested right in these licenses based on the fact that Defendants have renewed their licenses in the past, as well as their expectation of renewal due to the wording of the licensing scheme. Defendants argue that the 1997 amendment effects all existing and future adult entertainment establishments in Fulton County, and as such, constitutes legislative action undertaken by the Board in the normal manner prescribed by law.[15] Alternatively,

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[15] Plaintiffs argue that the ordinance constitutes adjudicative action because they occupy the only sites for adult entertainment; that Fulton County exempted them, as a prior non-conforming use, from a 1992 zoning ordinance prohibiting adult entertainment in establishments licensed to sell alcoholic beverages. The district court found that Section 18-76 applies to all adult entertainment establishments, whether existing or future, and relied on the averment of the Deputy Director of Environment and Community Development to the effect that numerous sites are available in Fulton County for other adult entertainment establishments. The district court also found that Plaintiffs do not have a vested property interest in the renewal of their license because, the Clubs were not exempt from the county's legitimate exercise of its police powers in furtherance of a substantial government interest. *Accord,*

Defendants argue that Plaintiffs had nothing more than a unilateral expectation in the renewal of their licenses, and as such were not exempt from a change in the law pursuant to a legitimate exercise of the city's police power to protect public welfare and safety. Finally, Defendants assert that the Plaintiffs received due process.[16]

Due process of law requires notice and an opportunity for some kind of hearing prior to the deprivation of a significant property interest. *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir.1994). Assuming, *arguendo*, that Section 18-76 operates as an adjudication targeted at the Clubs, and that the Clubs have a vested property right in their adult entertainment and liquor licenses, we agree with the district court that Plaintiffs were granted due process.[17] Plaintiffs' claim of a lack of procedural due process fails as a matter of law.

C. Prior Restraint

Next, Flashers and Fannies argue that the district court erred in failing to consider their claim that Section 18-76 is

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Goldrush II v. City of Marietta, 267 Ga. 683, 696, 482 S.E.2d 347 (1997) (rejecting plaintiff's state and federal constitutional claims).

[16] Although in their Brief Flashers and Fannies allege that the Defendants deprived the Clubs of their right to substantive and procedural due process, they fail to elaborate or provide any citation of authority in support of the former allegation. Therefore, we are left to conclude that Flashers and Fannies have waived this argument, and address only the claim for procedural due process. *See* Fed. R.App. P. 28(a)(9); *see also Continental Tech. Servs., Inc., v. Rockwell Int'l Corp.*, 927 F.2d 1198, 1199 (11th Cir.1991).

[17] Plaintiffs had notice of the Defendants' contemplated action at least as early as April 16, 1997, eight months prior to the amendment of Section 18-76. The Clubs were represented on a specially formed Adult Entertainment Committee, and had opportunity to discuss issues relating to the regulation at two public meetings of this committee. Finally, the Board conducted two public hearings, and permitted fifteen minutes to each Plaintiff's counsel, present at the first hearing, in order to present the Clubs' concerns and the Clubs' studies.

part of a licensing scheme that operates as an invalid prior restraint. *See FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 228, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990). In declining to address the merits, the district court held that the Plaintiffs' challenge to the licensing scheme was a new claim raised for the first time in response to the Defendants' motion for summary judgment. That response, filed more than fifteen months after commencement of this suit, was unaccompanied by either a motion to amend the pleadings or any reason justifying an amendment. Thus, we must decide whether the Plaintiffs' pleadings were sufficient to give Defendants and the court notice that the entire licensing scheme, and not just Section 18-76 were subject to challenge as a prior restraint. *See Lyes v. City of Riviera Beach*, 126 F.3d 1380, 1387 (11th Cir.1997) (deciding whether complaint invoking Fourteenth Amendment gave notice of equal protection claim where district court only analyzed due process claim).

Plaintiffs' complaints, at first blush, expressly challenge the "Liquor Ordinance" or "Ordinance" as a prior restraint. *See* Mardi Gras complaint in Civ. No. 1-98-CV2441, ¶¶ 34, 44; Plaintiffs Flashers' and Fannies' complaint in Civ. No. 1-98-CV-2904, ¶¶ 33, 42; Plaintiff Riley's complaint in Civ. No. 1-98-CV-2910, ¶ 8. However, a closer reading reveals that Plaintiffs specifically limited their constitutional challenge to the 1997 amendment which restricted the sale and consumption of alcohol at adult entertainment establishments, and the absence of negative secondary effects connected with the Clubs.[18] By contrast, the licensing scheme which Plaintiffs now attack is contained in separate sections of the

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[18] For example, Mardi Gras' complaint prays for a preliminary injunction on the basis that "the ordinance prohibiting the sale or consumption of alcohol on the premises of adult entertainment facilities (the 'Liquor Ordinance') is facially invalid in that it . . . constitutes a prior restraint. . . ." *See* Mardi Gras Complaint, ¶ 34. In fact, each of the nine legal causes of action asserted by Mardi Gras relies specifically on the 1997 amendment to Section 18-76.

Fulton County Code, sections 18-111 and 18-112 Division 2. Chapter 18 Article III. No part of the licensing regulation was a part of the 1997 amendment to Section 18-76 "Rules for Operation" Division 1. Chapter 18 Article III. We have not even been able to locate sections 18-111 and 18-112 of the Fulton County Code in the record. Accordingly, we find that the Plaintiffs failed to plead facts sufficient to notify Defendants or the court that they challenged the licensing scheme as a whole. We affirm the district court's decision not to address the merits of this claim.[19]

D. Obligation of Contract

Finally, Flashers and Fannies claim that Section 18-76 impairs the Clubs' right to contract in violation of the Contracts Clause. *See* U.S. Const. art. I, § 10, cl. 1. Specifically, Flashers and Fannies argue that their leases provide that the premises shall be used for a topless nudity bar, and require both clubs to maintain a liquor license.[20]

The United States Constitution provides that "no state shall . . . pass any Law impairing the Obligation of Contracts. . . ." U.S. Const. Art. I, § cl. 1. In evaluating a Contracts Clause

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[19] In its Brief, Flashers and Fannies contend that the district court erred in severing the prior restraint analysis from the question of the constitutionality of Section 18-76 because that section is part and parcel of a licensing scheme which operates as a prior restraint. However, the authority they cite is inapposite. *See 10280 Northfield Road, LLC v. Village of Northfield*, 173 F.3d 429 (6th Cir.1999). In that case, the Village of Northfield adopted an ordinance that sought to regulate adult entertainment businesses by enacting a zoning and licensing scheme. *See id.* The district court found that the licensing scheme operated as an unconstitutional prior restraint, and attempted to salvage the ordinance by severing the licensing scheme. *See id.* The Sixth Circuit held that the district court had impermissibly rewritten the ordinance because the ordinance was designed to function through the issuance or rejection of conditional permits. *See id.* These facts are not presented here.

[20] The record does not contain evidence of lease provisions involving the other Plaintiffs.

claim, the court must determine whether the state law operates as a substantial impairment of a contractual relationship and if so, whether the impairment is necessary to meet an important government interest. *Allied Structural Steel Co. v. Spannaus*, 438 U.S. 234, 98 S. Ct. 2716, 57 L. Ed. 2d 727 (1978). However, "it is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. . . . [T]he police power [ ] is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals." *Spannaus*, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722, 57 L. Ed. 2d 727.

We have already determined that the amendment to Section 18-76 constitutes a valid exercise of the Defendants' police powers. *See Pap's* (combating secondary effects related to nude dancing is clearly within city's police powers to protect public health and welfare). Thus, even if Section 18-76 impairs Plaintiffs' contractual leases, we agree with the district court that the ordinance remains a valid exercise of the County's police power to protect the health, safety, welfare and morals of its citizens.

IV. Conclusion

The district court granted summary judgment for Defendants on all grounds. We REVERSE the grant of summary judgment on the First Amendment freedom of expression claim and AFFIRM the grant of summary judgment on all other claims. We REMAND the case to the district court for further proceedings consistent with this opinion.

APPENDIX B

[Filed Feb 3, 2000]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION
NO. 1:98-cv-2441-GET

FLANIGAN'S ENTERPRISES, INC.
of GEORGIA, d/b/a Mardi Gras,

Plaintiff,

v.

FULTON COUNTY, GEORGIA, THE BOARD OF COMMISSIONERS OF FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his official capacity as Chairman of the Board of Commissioners of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, ROBERT FULTON, TOM LOWE, EMMA DARNELL, and MICHAEL HIGHTOWER, individually and in their official capacities as members of the Board of Commissioners of Fulton County, Georgia,

Defendants.

CIVIL ACTION
NO. 1:98-cv-2904-GET

6420 ROSWELL ROAD, INC. d/b/a Flashers, a Georgia Corporation, HARRY FREESE, individually and as Licensee for Flashers, FANNIES, INC., and WILLIAM H. PARKS, JR., individually and as owner of Fannies,

Plaintiffs,

v.

FULTON COUNTY, GEORGIA, THE BOARD of COMMISSIONERS of FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his official capacity as Chairman of the Board of Commissioners of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, ROBERT FULTON, TOM LOWE, EMMA DARNELL, and MICHAEL HIGHTOWER, individually and in their official capacities as members of the Board of Commissioners of Fulton County, Georgia,

Defendants.

CIVIL ACTION
NO. 1:98-cv-2910-GET

CEEDA ENTERPRISES, INC., d/b/a RILEY'S RESTAURANT AND LOUNGE,

Plaintiff,

v.

FULTON COUNTY, GEORGIA, THE BOARD of COMMISSIONERS of FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his official capacity as Chairman of the Board of Commissioners of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, ROBERT FULTON, TOM LOWE, EMMA DARNELL, and MICHAEL HIGHTOWER, individually and in their official capacities as members of the Board of Commissioners of Fulton County, Georgia,

Defendants.

ORDER

The above-styled action is presently before the court on defendants' motion for summary judgment (Case No. 98-cv-2441-GET) [docket no. 10-1] (Case No. 98-cv-2904-GET) [docket no. 8-1] (Case No. 98-cv-2910) [docket no. 11-1].

The three cases cited above have been consolidated by agreement of the parties. All plaintiffs have filed suit against defendants Fulton County and its Board of Commissioners alleging that amendments to Section 18-76 of Fulton County's adult entertainment ordinance, which prohibit the serving, offering or consuming of any alcoholic beverages on the premises of an adult entertainment establishment, violate the United States Constitution. Plaintiffs seek damages, a declaratory judgment stating these amendments are invalid, and a permanent injunction prohibiting the enforcement of these ordinance provisions against the plaintiffs. At this time, defendants seek summary judgment of all plaintiffs' claims.

I. Standard of Review

Courts should grant summary judgment when "there is no genuine issue as to any material fact . . . and the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party must "always bear the initial responsibility of informing the district court of the basis of its motion, and identifying those portions of 'the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any' which it believes demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986). That burden is "discharged by 'showing'—that is, pointing out to the district court—that there is an absence of evidence to support the nonmoving party's case." *Id.* at 325; *see also U.S. v. Four Parcels of Real Property*, 941 F.2d 1428, 1437 (11th Cir. 1991).

Once the movant has met this burden, the opposing party must then present evidence establishing that there is a genuine issue of material fact. *Celotex*, 477 U.S. at 325. The nonmoving party must go beyond the pleadings and submit evidence such as affidavits, depositions and admissions that are sufficient to demonstrate that if allowed to proceed to trial, a jury might return a verdict in his favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 257 (1986). If he does so, there is a genuine issue of fact that requires a trial. In making a determination of whether there is a material issue of fact, the evidence of the non-movant is to be believed and all justifiable inferences are to be drawn in his favor. *Id.* at 255; *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1529 (11th Cir. 1987). However, an issue is not genuine if it is unsupported by evidence that is "merely colorable" or is "not significantly probative." *Anderson*, 477 U.S. at 249-50. Similarly, a fact is not material unless it is identified by the controlling substantive law as an essential element of the nonmoving party's case. *Id.* at 248. Thus, to create a genuine issue of material fact for trial, the party opposing the summary judgment must come forward with specific evidence of every element essential to his case with respect to which (1) he has the burden of proof, and (2) the summary judgment movant has made a plausible showing of the absence of evidence of the necessary element. *Celotex*, 477 U.S. at 323.

II. Background

In light of the forgoing standard, the court finds the following facts for the purpose of resolving defendants' motions for summary judgment only.

On April 16, 1997, the Fulton County Board of Commissioners ("Board") passed a resolution directing the Police Department, the County Attorney, and the Department of Planning and Economic Development to conduct a study on the secondary effects of alcohol consumption in adult entertainment establishments in Fulton County. In June 1997,

the study of the six Fulton County establishments, four of which are owned by plaintiffs, was completed and distributed to the Board members on November 14, 1997, five days before the first public hearing to discuss the potential secondary effects. The study identified no detrimental impacts caused by these subject facilities.

The packet of information given to the Board on November 14 prior to the first public meeting also included outside studies of negative secondary effects of adult entertainment establishments and establishments which serve alcohol. These studies derived from the following cities: Austin, Texas, Los Angeles, California, Indianapolis, Indiana, and Minneapolis, Minnesota. Plaintiffs contend that these outside studies were not formally entered into the record at the November 17, 1997 meeting and therefore it is unclear as to whether the Board considered them before making their decisions and voting on the proposed ordinance to prohibit alcoholic consumption in establishments with live nude entertainment. However, the deposition testimony of the Board, together with the deposition of Angela Parker, Deputy Director of Environment and Community Development and the affidavit of Robert Regus, the Fulton County Manager during the relevant period, show that studies of other cities were given to each commissioner before the first public hearing and were considered by the Board before voting on the ordinance.

At the November 19 hearing, public comments were taken and counsel for plaintiffs were each allowed fifteen minutes to present their position regarding the proposed ordinance and the relevant studies.

On December 17, 1997 at the second public hearing, the Board met and approved the amendment to section 18-76 "Rules for Operation" prohibiting the serving, offering or consuming of any alcoholic beverages on the premises of an adult entertainment licensee. Section 18-76 now states that

> Any person, firm partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:
>
> . . .
>
> 7. No licensee shall permit any alcoholic beverages to be served, offered, or consumed on the premises.
>
> Violations of these rules and regulations may result in revocation of the license.

On August 25, 1998, plaintiff Flanigan's Enterprises, Inc. of Georgia, d/b/a Mardi Gras ("Flanigan's") filed a civil action against defendants Fulton County and the Fulton County Board of Commissioners, individually and in their official capacities. Flanigan's seeks a declaratory judgment that section 18-76 is unconstitutional, a preliminary and permanent injunction against the law's application, and damages for condemnation, intentional infliction of economic harm and breach of contract. On October 5, 1998, plaintiff CEEDA Enterprises, d/b/a Riley's Restaurant and Lounge ("CEEDA") and plaintiff 6420 Roswell Road, Inc. d/b/a Flashers, Harry Freese, Fannies, Inc., and William H. Parks, Jr. ("collectively Flashers and Fannies") filed suit against the same defendants. CEEDA Flashers and Fannies also request a declaratory judgment that the law is unconstitutional, a permanent injunction, and damages. Plaintiffs Flashers and Fannies further seek damages for condemnation, intentional infliction with business relations, and breach of contract. The cases have been consolidated by agreement of the parties. Together the plaintiffs represent four of the six adult entertainment establishments presently located in unincorporated Fulton County.

III. Discussion

Defendant Fulton County and its respective Board of Commissioners filed the instant motion for summary judgment contending that under the precedent of *Sammy's of Mobile, Ltd v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), and *Goldrush II, Inc. v. Marietta*, 267 Ga. 683 (1997), the amendments to Fulton County's entertainment ordinance are constitutional. The Board reviewed several secondary effect studies and held two public hearings, concluding that the combination of public nudity and alcohol results in criminal behavior and undesirable community conditions. Defendants claim that the amendments were passed pursuant to the county's legitimate objectives to (1) preserve the quality of urban life, (2) reduce crime, and (3) prevent neighborhood deterioration.

In all three cases, the respective plaintiffs have filed separate briefs in response to defendant's motion for summary judgment, however each has incorporated the briefs and arguments by the other plaintiffs. Accordingly, the court will address each argument as it relates to plaintiffs as a group.

A. *Level of scrutiny and the O'Brien test*

The Supreme Court has recognized that nude dancing may have some expressive content and if so, is therefore protected by the First Amendment. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 566, 111 S. Ct. 1495 (1991) (holding that nude dancing is "expressive conduct within the outer perimeters of the First Amendment"). Municipal ordinances like the one at issue that regulate nude dancing are consequently subject to constitutional scrutiny, the level of which depends on whether the law seeks to regulate the content of the particular conduct. *Id.* Pursuant to the First Amendment, content-based regulations are presumptively invalid. *R.A.V. v. City of St. Paul, Minnesota*, 505 U.S. 377, 381, 112 S. Ct. 2538 (1992)

(citing *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 112 S. Ct. 501 (1991)). However, in a few limited areas, restrictions upon the content of speech have been allowed where the social value of the particular speech is slight and obviously outweighed by society's interest in "order and morality." *R.A.V.*, 505 U.S. at 385 (citing *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572, 62 S.Ct. 766, 769 (1942)); *see e.g., California v. LaRue*, 409 U.S. 109, 114, 93 S.Ct. 390, 395 (1972) (holding that ordinance prohibiting nude dancing was valid).

As mentioned above, the first step in determining whether an ordinance regulating protected conduct is constitutional is to determine whether the law is content-based or content neutral and apply the appropriate level of scrutiny. *See Burson v. Freman*, 504 U.S. 191, 197-198, 112 S. Ct. 1846, 1850-1851 (1992); *Forsyth County, Ga. v. Nationalist Movement*, 505 U.S. 123, 133-135, 112 S. Ct 2395, 2403-2404 (1992).

In *Sammy's*, the Eleventh Circuit clearly held that an ordinance similar to the one at issue in this case was content-neutral and therefore should be reviewed under intermediate scrutiny. 140 F.3d at 996. As in this case, the plaintiff clubs in *Sammy's* held liquor licenses and offered nude entertainment and were challenging the constitutionality of a city ordinance which prohibited nude dancing in establishments licensed to sell liquor. Accordingly, the court finds that the Fulton County ordinance is content-neutral and is constitutional under the *O'Brien* intermediate scrutiny test if "(1) the interest served is within the power of the government; (2) the regulation furthers that interest; (3) the interest served is unrelated to free expression; and (4) there is no less restrictive alternative." *Sammy's*, 140 F.3d at 996 (citing *United States v. O'Brien*, 391 U.S. 367, 88 S.Ct. 1673 (1968)). The court finds that plaintiff CEEDA's argument regarding the Board's alleged disregard of the local studies is not addressed to the

level of scrutiny issue, but instead speaks to whether the regulation will further the government's substantial interest in regulating crime and morality as will be discussed below.

Under the *O'Brien* test, plaintiffs concede that the government can regulate nude dancing and that the statute is not overbroad. However, plaintiffs assert that the government has failed to show as a matter of law that the regulation furthers a legitimate interest and that the interest served is unrelated to free expression.

After careful review of the record, as well as the relevant law, the court finds that the amendment to section 18-76, prohibiting the sale of alcohol in adult entertainment establishments, is constitutional under the *O'Brien* test. As the Eleventh Circuit held in *Krueger v. City of Pensacola*, 759 F.2d 851, 855 (1985), the government must show more than speculative factual grounds and must further show that it was motivated by such facts. The preamble of the 1997 amendment to section 18-76 states clearly that the Fulton County Board of Commissioners has found that, according to the relevant experience of other similar urban counties and municipalities, public nudity "under certain circumstances in adult entertainment facilities offering live entertainment begets criminal behavior and tends to create undesirable community conditions." Thus, just as the Eleventh Circuit held in *Sammy's*, which addressed an almost identical city ordinance, defendants Fulton County and its Board of Commissioners have established that the amendment to section 18-76 furthers a government interest unrelated to free expression: the prevention of negative secondary effects related to nude dancing. *Sammy's*, 140 F.3d at 997 (finding that the Supreme Court as well as the Eleventh Circuit have approved of many ordinances which regulate nude entertainment). *See also, Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 570, 111 S. Ct. 2456, 2462-63 (1991) (upholding Indiana's prohibition on public nudity as applied to nude

dancing); *California v. LaRue*, 409 U.S. 109, 114, 93 S. Ct. 390, 395 (1972) (finding California's rules censoring sexual live entertainment at establishments licensed to disperse liquor to be constitutional).

In their brief, plaintiffs further argue that the absence of any reference to the Twenty-first Amendment distinguishes this ordinance from that considered in *Sammy's*. The Twenty-first Amendment grants states authority to regulate the distribution of alcohol within their borders. U.S. Const., amend. XXI. The court finds the absence of any citation in the preamble of Fulton County's ordinance to the Twenty-first Amendment to be irrelevant as Fulton County has the authority to pass such laws pursuant to its general police power. *See LaRue*, 517 U.S. at 515 ("[e]ntirely apart from the Twenty-first Amendment, the State has ample power to prohibit the sale of alcoholic beverages in inappropriate locations"); *Krueger*, 759 F.2d at 854 (holding that as Florida has not delegated its regulatory authority under the Twenty-first Amendment to municipalities, the city must justify its ordinance under the government's police power).

Additionally, plaintiffs unsuccessfully suggest that *Sammy's* is not binding precedent under the facts of this case. First, plaintiffs complain about the age of the studies in this case and the fact they concern cities many miles away. However, plaintiffs do not argue that the adult entertainment industry has changed significantly over this time so as to lessen these findings of secondary negative effects. Moreover, the court concludes that the cities in the studies, although geographically distant, are major urban areas such as Atlanta, Georgia which have a history of adult entertainment establishments. Second, plaintiffs' attempt to negate the value of the outside studies because they do not address nude entertainment and alcohol in combination is also unconvincing. The study in Indianapolis addresses both the negative secondary effects of nude entertainment and those of

establishments serving alcohol. As the court noted in *Sammy's*, the "Supreme Court has recognized that any form of nudity coupled with alcohol in a public place begets undesirable behavior." 140 F.3d at 997 (quoting New *York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718, 101 S.Ct. 2599 (1981)).

A. *Procedural due process*

The due process clause of the Fourteenth Amendment protects individuals against governmental deprivations of "life, liberty or property" without due process of law. U.S. Const. Amend. XIV, §1. "Ordinarily, due process of law requires [notice and] an opportunity for some kind of hearing prior to the deprivation of a significant property interest." *Halverson v. Skagit County*, 42 F.3d 1257, 1260 (9th Cir. 1994) (quoting *Sinaloa Lake Owners Ass' n v. City of Simi Valley*, 882 F.2d 1398, 1405 (9th Cir. 1989), *cert. denied*, 494 U.S. 1016 (1990)). However, if the court finds that the governmental conduct is legislative, generally, the property owner has no procedural due process rights. *County Line Joint Venture v. City of Grand Prairie, Texas*, 839 F.2d 1142, 1144 (5th Cir. 1988).

1. *Legislative or adjudicative*

Plaintiffs contend that defendants' passing of the amendment to section 18-76 operates as an adjudication because its enactment was predicated on fact-findings relating specifically to plaintiffs and therefore they are entitled to greater due process. Plaintiffs also assert that under the zoning scheme, they own the only sites available for adult entertainment in unincorporated Fulton County and therefore defendants must have realized that the ordinance once enacted would impact the plaintiffs uniquely and adversely.

To determine whether a particular governmental action is legislative or adjudicatory, courts have focused on the "character of the action, rather than its label." *Halverson*, 42

F.3d at 1260 (quoting *Harris v. County of Riverside*, 904 F.2d 497, 501 (9th Cir. 1990)). In this action, the court finds that the amendment to section 18-76 applies generally to all adult entertainment establishments which exist now or are created in the future. The Board clearly relied not on the more specific study of plaintiffs' businesses, but on the studies of negative secondary effects in other metropolitan areas. Further, Angela Parks, Deputy Director of Environment and Community Development, has testified in an affidavit that in her opinion numerous sites are available in Fulton County, Georgia for other adult entertainment establishments and therefore there is evidence that plaintiffs are not the only parties potentially affected by the new ordinance. Accordingly, the court finds that defendants' actions in passing the amendment to section 18-76 was legislative not adjudicative.

2. *Vested property right*

Even if the court were to hold that the amendment to section 18-76 was an adjudicative action, procedural due process rights only follow if plaintiffs can establish a vested property right under federal or state law and a failure to grant sufficient due process in light of any such right. *See County Line*, 839 F. 2d at 1144.

In *Goldrush II v. City of Marietta*, 267 Ga. 683, 696 (1997), the Georgia Supreme Court addressed whether an almost identical ordinance enacted by the city of Marietta prohibiting the sale and consumption of alcohol in establishments with live nude dancing was constitutional under both federal and state law. As the plaintiffs in *Goldrush II*, plaintiffs in this action assert that they have a vested right to continue to offer adult entertainment and alcohol based on Fulton County's past practice of annually issuing licenses to them. In *Goldrush II*, the court held that plaintiffs did not have a vested right in the renewal of their licenses as they were "not exempted from the exercise of the city's police

power by its elected officials to further an important governmental interest." *Id.* at 697. The court concluded that plaintiff's reliance upon the past renewal of their licenses amounted only to a "unilateral expectation." *Id.*

After reviewing the record, as well the relevant law, the court finds that plaintiffs do not have a vested right in the renewal of their licenses. Although Fulton County has renewed plaintiffs' respective licenses for several years, section 18-42 of Article II of Fulton County's Code of Ordinances regulating adult entertainment establishments requires that annual registration "shall be conducted in accordance with the terms of this article." Thus, as in *Goldrush II*, plaintiffs do not have a vested right in the law never changing and are not exempt from the county's legitimate exercise of its police power in the furtherance a substantial governmental interest. The court therefore finds that plaintiffs do not have a protectible property interest in the renewal of their licenses under the facts of this case.

As the court holds that plaintiffs do not have a vested property right in the renewal of their licenses, plaintiffs' *de facto* condemnation claim and request for just compensation pursuant to the Fifth and Fourteenth Amendment must also fail. U.S. Const., amend. V. *See also, United States v. Jim*, 409 U.S. 80, 93 S.Ct. 261 (1973) (finding that plaintiffs did not have a constitutionally protected property right and therefore statute did not serve as an unconstitutional taking)). As plaintiffs concede that their claim labeled "intentional infliction of economic harm" is "basically tied to the condemnation theory," that claim is also without merit.

3. *Sufficient due process*

Moreover, the court also finds that plaintiffs were in fact granted certain due process at the November 19, 1997 public hearing. Plaintiffs' counsel were given notice of the proposed legislation and were allowed fifteen (15) minutes to state their concerns as well as permitted to submit their own

studies and affidavits regarding the alleged negative secondary effects of alcohol and live nude entertainment. Plaintiffs do not cite, and the court does not find, any supporting authority mandating that this opportunity was not sufficient for purposes of due process under these facts. Thus, the court finds that plaintiff's claim of a lack of procedural due process fails as a matter of law.

B. *Prior restraint*

According to plaintiffs, Fulton County's licensing ordinance for adult entertainment establishments serves as an invalid prior restraint because it (1) fails to require prompt decisions; (2) fails to require prompt judicial review; and (3) grants unbridled discretion to delay permission for the license.

Defendants respond that this is the first time plaintiffs have raised this argument and that as plaintiffs failed to present this challenge to the licensing scheme before the Fulton County Board of Commissioners, it is precluded from review by this court.

The licensing scheme which plaintiffs now attack is contained in separate sections of the code, sections 18-111 and 18-112, which were last amended in 1992. No part of the licensing regulation itself was a part of the most recent amendment to section 18-76, "Rules for operation," addressing the prohibition of the sale of alcohol in adult entertainment establishments. Plaintiffs' original complaints and mandatory disclosures only addressed section 18-76 and the 1997 amendment to that section. Moreover, at the second public hearing on December 17, 1997, plaintiffs limited their arguments to the new amendment to section 18-76, contending that there was no probative evidence of the existence of negative secondary effects, and never mentioned the licensing part of the statute. Thus, the court finds that plaintiffs' challenge to the licensing scheme in sections 18-

111 and 18-112 is a new claim which is raised for the first time in their response to defendants' motion for summary judgment. That response, filed more than fifteen months after commencement of this suit, is unaccompanied by either a motion to amend the pleadings or any reason justifying an amendment. Accordingly, the court will not consider plaintiffs' prior restraint claims as they relate to sections 18-111 and 18-112. *See Stallcop v. Kaiser Foundation Hospitals*, 820 F.2d 1044, 1050 n.5 (9th Cir.1987); *Baker v. Penn Mutual Life Insurance Co.*, 788 F.2d 650, 656 (10th Cir. 1986); *Ross v. Houston Independent School District*, 699 F.2d 218 (5th Cir. 1983); *Barnes v. Burger King Corp.*, 932 F.Supp. 1420, 1429 (S.D. Fla. 1996).

C. *Obligations of contract*

Plaintiffs Flashers and Fannies contend that the ordinance impairs its contract with its landlord for the lease of the premises. Specifically, plaintiffs' leases for the two adult entertainment establishments state that the property shall be used for a topless nudity bar and for no other purpose and that plaintiffs are required to maintain their liquor license. Neither plaintiff Flanigan's nor CEEDA who reference Flashers' brief have attached their lease in support of this argument.

The United States Constitution provides that "no State shall. . . pass any Law impairing the Obligation of Contracts. . ." U.S. Const. Art. I, § 10, cl. 1. In evaluating a Contracts Clause claim, the court must determine whether the state law operates as a substantial impairment of a contractual relationship and if so, whether the impairment is necessary to meet an important governmental interest

> [I]t is to be accepted as a commonplace that the Contract Clause does not operate to obliterate the police power of the States. "It is the settled law of this court that the interdiction of statutes impairing the obligation of contracts does not prevent the State from

> exercising such powers as are vested in it for the promotion of the common weal, or are necessary for the general good of the public, though contracts previously entered into between individuals may thereby be affected. This power, which, in its various ramifications, is known as the police power, is an exercise of the sovereign right of the Government to protect the lives, health, morals, comfort and general welfare of the people, and is paramount to any rights under contracts between individuals."

Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 244, 98 S. Ct. 2716, 2722 (1978) (quoting *Manigault v. Springs*, 199 U.S. 473, 480, 26 S. Ct. 127, 130 (1905)).

As the court has held above, Fulton County's amendment to section 18-76 of its county ordinance regulating adult entertainment establishments is a valid exercise of its police power. Thus, even assuming plaintiffs Flashers and Fannies have shown that the ordinance would in fact impair their lease contracts, the court finds such impairment is necessary to promote a substantial governmental interest.

Accordingly, the court GRANTS defendants' motion for summary judgment [docket no. 8-1]. The court notes that plaintiffs fail to address their claim for intentional interference with business relations and therefore this claim is considered abandoned. The court further finds that plaintiffs do not appear to make a claim of bill of attainder in either their complaints or their responses to defendants' motion for summary judgment and therefore defendants' argument as to such a claim is irrelevant and will not be considered by the court.

III Summary

The court GRANTS defendants' motion for summary judgment (Case No. 98-cv-2441-GET) [docket no. 10-1] (Case No. 98-cv-2904-GET) [docket no. 8-1] (Case No. 98-cv-2910) [docket no. 11-1] .

SO ORDERED, this 3 day of February, 2000.

/s/ G. Ernest Tidwell
G. ERNEST TIDWELL, Judge
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:98-cv-2904-GET

6420 ROSWELL ROAD, INC., *et al.*
Plaintiff,

VS.

FULTON COUNTY, GEORGIA, *et al.*,
Defendant.

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of defendants' motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants recover the costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 4th day of February, 2000.

LUTHER D. THOMAS.
Clerk Of Court

By: Illegible
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
February 4, 2000

Luther D. Thomas
Clerk of Court

By: /s/ Illegible
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:98-cv-2441-GET

FLANIGAN'S ENTERPRISES, INC. of GEORGIA,
Plaintiff,

vs.

FULTON COUNTY, GEORGIA, *et al.*,
Defendant.

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of defendants' motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants recover the costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 4th day of February, 2000.

LUTHER D. THOMAS.
Clerk Of Court

By: Illegible
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
February 4, 2000
Luther D. Thomas
Clerk of Court
By: /s/ Illegible
Deputy Clerk

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

CIVIL ACTION FILE
NO. 1:98-cv-2910-GET

CEEDA ENTERPRISES, INC.,

Plaintiff,

VS.

FULTON COUNTY, GEORGIA, *et al.*,

Defendant.

JUDGMENT

This action having come before the court, Honorable G. Ernest Tidwell, United States District Judge, for consideration of defendants' motion for summary judgment, and the court having granted said motion, it is

Ordered and Adjudged that the plaintiff take nothing; that the defendants recover the costs of this action, and the action be, and the same hereby, is dismissed.

Dated at Atlanta, Georgia, this 4th day of February, 2000.

LUTHER D. THOMAS.
Clerk Of Court

By: Illegible
Deputy Clerk

Prepared, Filed, and Entered
in the Clerk's Office
February 4, 2000
Luther D. Thomas
Clerk of Court
By: /s/ Illegible
Deputy Clerk

APPENDIX C

[Filed Apr 23, 2001]

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 00-11152-II

FLANIGAN'S ENTERPRISES, INC.
of GEORGIA, d.b.a. Mardi Gras,
Plaintiff-Appellant,

versus

FULTON COUNTY, GEORGIA, THE BOARD OF COMMISSIONERS of FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his of official capacity as Commissioner of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, ROBERT FULTON, in their individual capacities and as Commissioners of FULTON COUNTY, *et al.*,
Defendants-Appellees,

6420 ROSWELL ROAD, INC., a Georgia Corporation, d.b.a. Flashers, HARRY FREESE, individually and as Licensee for Flashers, FANNIES, INC. d.b.a. Fannies, WILLIAM H. PARKS, JR., individually and as owner of Fannies
Plaintiffs- Appellants,

versus

FULTON COUNTY, THE BOARD OF COMMISSIONERS OF FULTON COUNTY, GEORGIA, MITCH SKANDALAKIS, individually and in his official capacity as Chairman of the Board of Commissioners of Fulton County, Georgia, NANCY BOXILL, GORDON JOYNER, *et al.*,
Defendants-Appellees,

CEEDA ENTERPRISES, INC., d.b.a.
Riley's Restaurant & Lounge,

Plaintiff-Appellant,

versus

FULTON COUNTY, GEORGIA, THE BOARD OF COMMISSIONERS of FULTON COUNTY, GEORGIA, MITCH SKANDALASKIS, Chairman, individually and in his official capacity as a commissioner of Fulton County, NANCY BOXILL, individually and in her official capacity as a commissioner of Fulton County, EMMA I. DARNELL, individually and in her official capacity as commissioner of Fulton County, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the Northern District of Georgia

ON PETITION (S) FOR REHEARING
AND PETITION (S) FOR REHEARING EN BANC

(Opinion____, 11th Cir., 19____, ___F.2d___).

Before: DUBINA, FAY and COX, *Circuit Judges.*

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

/s/ Peter T. Fay
PETER T. FAY
UNITED STATE CIRCUIT JUDGE

APPENDIX D

ORDINANCE AMENDING SECTION 18-76, CODE OF LAWS OF FULTON COUNTY, GEORGIA, TO PROHIBIT THE SERVING, OFFERING, OR CONSUMPTION OF ALCOHOLIC BEVERAGES IN ADULT ENTERTAINMENT FACILITIES

WHEREAS, Article III, Section VI, Paragraph VII, Constitution of the State of Georgia, delegates authority to counties and municipalities ". . . . for the purpose of regulating, restricting, or prohibiting the exhibition of nudity, partial nudity, or depictions of nudity in connection with the sale or consumption of alcoholic beverages . . ."; and

WHEREAS, the Supreme Court of Georgia, on March 17, 1997, in the consolidated cases of *Goldrush II, et. al., v. City of Marietta, et al.*; *Varsalona's Italian Restaurant d/b/a Boomer's et al. v. City of Marietta, et al.; and Tudor d/b/a Cyprus Lounge v. City of Marietta, et al.*, 267 Ga. 683 (1997), upheld a City of Marietta, Georgia, ordinance which prohibits the serving or consumption of alcoholic beverages in adult entertainment establishments; and

WHEREAS, the United States Supreme Court, in October, 1997, refused to grant certiorari in an appeal of the said consolidated cases; and

WHEREAS, the Georgia Supreme Court. in *Chambers v. Peach County*, 266 Ga. 318 (1996), has previously held that, before enacting an ordinance to combat undesirable secondary effects of adult entertainment, a legislative body is required to consider specific evidence of the undesirable secondary effects that it reasonably believes relevant to the problems it seeks to address by passing the ordinance; and

WHEREAS, in a public hearing held November 19, 1997, the Board of Commissioners heard testimony and received

studies from its staff, the public, and from representatives of the adult entertainment industry concurring negative secondary effects connected with adult entertainment facilities where alcoholic beverages are consumed, and live nude, or partially nude, performances are presented; and

WHEREAS, based upon the experience of other urban counties and municipalities, which experiences the Board of Commissioners finds are relevant to the problems faced by Fulton County, Georgia, and which do not vary greatly among generally comparable communities within this country, the Board of Commissioners finds that public nudity, under certain circumstances, particularly circumstances related to the sale and consumption of alcoholic beverages in adult entertainment facilities offering live entertainment, begets criminal behavior and tends to create undesirable community conditions; and

WHEREAS, among the undesirable community conditions identified with live nude entertainment and alcohol are depression of property values in the surrounding neighborhood, increased expenditure for the allocation of law enforcement personnel to preserve law and order, increased burden on the judicial system as a consequence of the criminal behavior herein above described, and acceleration of community blight by the concentration of such establishments in particular areas; and

WHEREAS, the limitation of nude conduct in establishments licensed to sell alcohol for consumption on the premises is in the public welfare, and it is a matter of governmental interest and concern to prevent the occurrence criminal behavior and undesirable community conditions normally associated with establishments which serve alcohol and also allow or encourage nudity; and

WHEREAS, it is the. intent of the Board of Commissioners to enact a carefully tailored regulation to minimize the

negative secondary effects of the serving and consumption of alcoholic beverages at adult entertainment facilities; and

WHEREAS, it is not the intent of the Board of Commissioners, in enacting any such ordinance amendment, to deny to any person rights to speech or expression protected by the United States or Georgia Constitutions, nor it is the intent to deny or restrict the rights of any adult to obtain or view any sexually oriented performance or materials protected by the United States or Georgia Constitutions, but to adopt a content neutral measure to address the secondary effects of adult entertainment establishments where alcoholic beverages are served or consumed; and

WHEREAS, this Ordinance is enacted to further the health, safety, and welfare of the citizens of Fulton County.

NOW, THEREFORE, BE IT ORDAINED by the Board of Commissioners of Fulton County, Georgia, that:

Section 1. Amendment to Section 18-76. Section 18-76, Code of Laws of Fulton County (1997), is hereby amended to read as follows:

Sec. 18-76. Rules for operation.

Any person, firm, partnership, or corporation licensed hereunder shall comply with the following rules and regulations pertaining to the operation of the adult entertainment establishment:

(1) No licensee shall operate between the hours of 4:00 a.m. and 9.00 a.m.

(2) No person under the age of 18 shall be permitted on the premises.

(3) No patron shall be permitted to fondle or caress any performers, nor shall any performer be permitted to fondle or caress a patron.

(4) No tips for performers shall be placed on the person of the performer except by hand to hand.

(5) All performers of adult entertainment shall be restricted to fixed stages, and no patron shall be permitted on such stages. Fixed stage shall be defined as a raised floor area designed exclusively for use by performers.

(6) The license shall be displayed in a prominent place on the premises at all times.

(7) No licensée shall permit any alcoholic beverages to be served, offered, or consumed on the premises.

Violations of these rules and regulations may result in the revocation of the license.

Section 2. Severability. It is declared to be the intent of the Board of Commissioners that, if any section, subsection, sentence, clause, phrase, or portion of this Ordinance is for any reason held invalid or unconstitutional by any court of competent jurisdiction, such portion shall be deemed a separate, distinct and independent provision, and such holding shall not affect the validity of the remaining portions hereof.

Section 3. Conflict. Any Ordinance or part thereof in conflict with this Ordinance or any part hereof is hereby repealed to the extent of the conflict.

Section 4. Inclusion into the Code. The provisions of this Ordinance shall be included and incorporated within the Code of Laws of Fulton County (1997), and may be renumbered or relettered to accommodate such inclusion.

Section 5. Effective Date. This Ordinance shall take effect on January 1, 1998; provided, however, that it shall not take effect until December 31, 1998, for adult entertainment facilities holding adult entertainment licenses on December 17, 1997.

ENACTED by the Board of Commissioners of Fulton County, Georgia, this seventeenth day of December, 1997.

BOARD OF COMMISSIONERS
OF FULTON COUNTY,
GEORGIA

By: /s/ Mitch J. Skandalakis
MITCH J. SKANDALAKIS,
Chairman

ATTEST:

/s/ Justine Boyd
JUSTINE BOYD, Clerk

APPROVED AS TO FORM & LEGALITY:

/s/ Gerry Clark
GERRY CLARK
FOR Linda T. Walker, Acting County Attorney

(2)

No. 01-144

Supreme Court, U.S.
FILED
OCT 10 2001
OFFICE OF THE CLERK

In The

Supreme Court of the United States

FULTON COUNTY, GEORGIA, *et al.*,

Petitioners,

v.

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, *et al.*,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENT CEEDA ENTERPRISES, INC. d/b/a RILEY'S RESTAURANT AND LOUNGE'S BRIEF IN OPPOSITION

JAMES N. CLINE
Counsel of Record
920 Holcomb Bridge Road
Suite 160
Roswell, Georgia 30078
(770) 518-0910

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTIONS PRESENTED

I. Before enacting an ordinance that seeks to address negative secondary effects associated with adult entertainment establishments, must a local government await actual development of such negative secondary effects within its jurisdiction, or may the local government legislate in a preventive fashion based upon evidence of such negative secondary effects from other local government jurisdictions?

II. Where a local government relies upon judicially approved studies from other jurisdictions indicating that negative secondary effects are associated with adult entertainment establishments, does a resulting local government ordinance that prohibits the service or consumption of alcohol at adult entertainment establishments violate the First Amendment because studies specific to that local government's jurisdiction did not indicate negative secondary effects associated with such establishments?

LIST OF INTERESTED PARTIES

Pursuant to Rule 14.1(b), the following list indicates all of the parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Fulton County, Georgia,
Appellee Below,
The Board of Commissioners of Fulton County, Georgia,
Appellee Below,
Mitch Skandalakis,
Appellee Below,
Nancy Boxill,
Appellee Below,
Gordon Joyner,
Appellee Below,
Robert Fulton,
Appellee Below,
Tom Lowe,
Appellee Below,
Emma Darnell,
Appellee Below,
Michael Hightower,
Appellee Below,
Flanigan's Enterprises, Inc. of Georgia,
Appellant Below,
6420 Roswell Road, Inc.,
Appellant Below,
Harry J. Freese,
Appellant Below,
Fannies, Inc.,
Appellant Below,
William H. Parks, Jr.,
Appellant Below,
CEEDA Enterprises, Inc.,
Appellant Below.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent CEEDA Enterprises, Inc. d/b/a Riley's Restaurant and Lounge states that it is a privately owned company, has no parent company, and no publicly held company owns 10% or more of its stock.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

CEEDA Enterprises, Inc. d/b/a Riley's Restaurant & Lounge ("CEEDA") respectfully submits that the decision below correctly analyzed the facts and applied the governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

OBJECTION TO QUESTIONS PRESENTED

CEEDA objects to the Petitioners' first question presented. At no time was this ever a question below. The local government is given broad latitude in making legislative decisions regarding conditions the municipality deems that its citizens may be exposed to that may have an adverse impact on the community as a whole. The only question presented is whether the governing body applied the correct standards in passing such legislation complained of below. This Court and other courts have held that any time a governing body, whether local, state, or federal, desires to set forth legislation that may have an impact on one's First Amendment rights, the burden of proof shifts to the governing body to make certain that such legislation is content-neutral and not content-based.

ARGUMENT

I. THE ELEVENTH CIRCUIT COURT OF APPEALS' DECISION DOES NOT CREATE A CONFLICT AMONG FEDERAL CIRCUIT COURTS OF APPEALS

The Petitioners are somewhat misguided by their belief that the Eleventh Circuit Court of Appeals' decision creates a conflict among the various circuits.

All of the Circuits agree that the governing body when passing legislation involving First Amendment matters has the burden of proving that the ordinance is content-neutral and supports some compelling governmental interest of the body passing the ordinance.

I fail to see how Fulton County can say that any local government needs to wait until the secondary adverse effects complained of have descended upon them before passing an ordinance to combat the same.

The Appeals Court simply stated that if the local government conducts a study and that study reveals no secondary effects in the local area, then the studies from other jurisdictions cannot be used in furtherance of the proposed ordinance. In other words, one does not get a choice. If you make the study, then you must abide by the results thereof. The Court of Appeals simply said that Fulton County had not met the second prong of *O'Brien*. See *O'Brien*, 391 U.S. at 377, 88 S.Ct. at 1679.

Further, all Circuits agree with the standard set out in *Renton* that "[T]he First Amendment does not require a city before enacting such an ordinance, to conduct new studies or produce evidence independent of that already generated by other cities, so long as whatever evidence

the city relies upon is reasonably believed to be relevant to the problem that the city addresses." See *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

II. THE ELEVENTH CIRCUIT DECISION DOES NOT CONFLICT WITH THE SUPREME COURT OF THE UNITED STATES AND EARLIER DECISIONS OF THE ELEVENTH CIRCUIT COURT OF APPEALS.

The Eleventh Circuit Court of Appeals' decision in the matter before the Court correctly states the law as applied in *O'Brien*, supra.

Fulton County clearly did not meet its burden as required by all Circuits and the U.S. Supreme Court. It failed to prove, through its own study, that any adverse secondary effects existed in the county – the evidence did not support its proffered justification for amending Section 18-76 of its Ordinances. It had no governmental interest to protect.

Both Fulton County and the four clubs, consolidated for trial purposes, commissioned studies as to the adverse secondary effects these adult entertainment clubs might have on the communities surrounding them. Both studies reached the same conclusion – there were no adverse secondary effects connected with the clubs in question. A fifth club participated in the studies but brought a separate action in state court.

The Georgia Supreme Court has stated that in order for local governing bodies to pass ordinances prohibiting the mix of live nude entertainment and the consumption and sale of alcoholic beverages on the same premises at

the same time, the body must rely on its own studies or studies made in other communities that have the same situation. The Court went on to state that if the local government chose to make its own studies then it should be prepared to suffer the results of such study. See *Chambers v. Peach County*, 266 Ga. 318, 467 S.E. 2d 519 (1996).

Peach County lost the first round in the battle but came back a second time after being told by the Georgia Supreme Court how to do it the right way. It chose to rely on studies from other jurisdictions.

Fulton County did just the opposite. The Fulton County Board of Commissioners authorized a Study Group Committee to find out if any of the adverse secondary effects existed in the county in regard to the clubs offering alcoholic beverages and live nude entertainment. The Committee was comprised of various staff people from the Planning, Legal, and Police Departments of Fulton County, citizens of the community, and the club owners.

In the end, the Committee determined that no adverse secondary effects existed in Fulton County in relation to these adult entertainment clubs. The adverse secondary effects referred to are: 1) diminution of property values, 2) increase in crime around the clubs, and 3) urban blight around the clubs affected.

Fulton County simply chose not to follow its own study that showed no adverse secondary effects, but chose to rely upon studies from other jurisdictions as its evidence in passing the amendment to Section 18-76 of its

Ordinances. Accordingly, it did not meet its burden with regard to the second prong of *O'Brien*, supra.

CONCLUSION

The Eleventh Circuit correctly applied the law as set out in *O'Brien*; accordingly, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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(3)

No. 00-144

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

FULTON COUNTY, GEORGIA, et al.,

Petitioners,

v.

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, 6420 ROSWELL ROAD, INC., HARRY FREESE, FANNIES, INC., AND WILLIAM H. PARKS, JR.'S BRIEF IN OPPOSITION

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PARTIES TO THE PROCEEDING

Pursuant to Rule 14.1(b), the following list identifies all of the parties to the proceeding in the United States Court of Appeals for the Eleventh Circuit whose judgment is sought to be reviewed:

Fulton County, Georgia,

Appellee Below.

The Board of Commissioners of Fulton County, Georgia,

Appellee Below.

Mitch Skandalakis,

Appellee Below.

Nancy Boxill,

Appellee Below.

Gordon Joyner,

Appellee Below.

Robert Fulton,

Appellee Below.

Tom Lowe,

Appellee Below.

Emma Darnell,

Appellee Below.

Michael Hightower,

Appellee Below.

PARTIES TO THE PROCEEDING – Continued

Flanigan's Enterprises, Inc. of Georgia,

Appellant Below.

6420 Roswell Road, Inc.,

Appellant Below.

Harry Freese,

Appellant Below.

Fannies, Inc.,

Appellant Below.

William H. Parks, Jr.,

Appellant Below.

Ceeda Enterprises, Inc.,

Appellant Below.

CORPORATE DISCLOSURE STATEMENT

There are no parent corporations or publicly held companies owning 10% or more of the stock of the corporate Respondents.

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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Flanigan's Enterprises, Inc. of Georgia, 6420 Roswell Road, Inc., Harry Freese, Fannies, Inc., and William H. Parks, Jr. (collectively "the Clubs") respectfully submit that the decision below correctly analyzed the facts and applied governing law, and that the Petition for Writ of Certiorari, presenting no valid grounds for review, should be denied.

STATEMENT OF THE CASE

The facts controlling the questions presented by Fulton County and its Board of Commissioners (collectively "the County") are set forth in detail in the opinion of the Court of Appeals. Pet. App. A at 1a-23a.[1] This case does not concern cities in Texas, Minnesota, or Indiana, nor does it deal with decisions to zone adult theaters into industrial districts. This case does not concern California's treatment of alcoholic beverages in the early 1970s, nor Alabama's treatment of alcoholic beverages in the latter 1990s. Nor do the facts of the case address speculation or conjecture. Those slates are chalked for a different time and a different place.

[1] The Clubs take issue with certain subsidiary fact-findings by the Eleventh Circuit, which apparently did not alter the analysis of the court below. For instance, the Clubs contend that the County never in fact submitted the out-of-state studies to the Board for review and "reliance." In depositions, none of the Board of Commission members could specifically recall reviewing the studies prior to voting the Ordinance into law.

This case concerns Fulton County and its legislative record. The court below properly determined that on this record no reasonable basis exists to believe that the Ordinance will further a substantial governmental interest. The Court reached this conclusion only after examining the factual record, and determining that the Ordinance simply failed the *O'Brien* test. *United States v. O'Brien*, 391 U.S. 367 (1968). The lower court did nothing more or less than apply the test set out by this Court in *Pap's* by allowing affected businesses to challenge legislative findings of fact. *City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000).

Fulton County drafted a Resolution directing an advisory committee and departmental staff ("the County Staff") to study the activities, businesses, and properties of the three Respondent Clubs and the three other existing Fulton County adult entertainment establishments, for the sole purpose of determining whether the Ordinance was warranted. Pet. App. A at 3a.

The County commissioned its police department to conduct a study of the crime statistics concerning twelve drinking establishments; six featuring adult entertainment and six which did not.[2] *Id.* That study concluded:

---

[2] Prior to adopting the Ordinance, the County and the "adult entertainment establishments located in Fulton County" did not "jointly" conduct studies regarding negative secondary effects. *Compare* Pet. at 4. The studies conducted by the Fulton County Police Department and the County's designated real estate appraiser, Dabney & Associates, were *independently* prepared, with no input from the adult clubs other adult entertainment representatives.

> There was no statistical correlation showing an increase in crime in adult entertainment establishments that served alcoholic beverages. Rather, the statistics indicated greater instances of calls for service and reported crime at non-adult entertainment establishments that served alcoholic beverages.

Id.

The six adult dance clubs also commissioned studies which examined their "economic impact upon their surrounding environs." *Id.* at 4a. Those studies did "not identify any detrimental impacts as caused by the Clubs." The County commissioned an analysis and critique of the Clubs' studies, which validated their findings and concluded that the "Clubs had caused no quantifiable 'blight' upon their environs." *Id.* at 5a.

A public hearing on the Ordinance was held on November 19, 1997. At that hearing, while it is true that the "Board received testimony from representatives of the adult entertainment establishments opposing the Ordinance, as well as testimony from citizens in favor of the proposed Ordinance" (Pet. at 5), the Board also received a recommendation from its specially formed Adult Entertainment Committee that the Ordinance was not warranted. Yet the County enacted the Ordinance.

The Eleventh Circuit began its analysis by noting that it could find "no basis" for the Fulton County's contention that pursuant to *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991) and *Pap's*, the Court could merely "presume the evidence needed to meet the second prong [furthering a governmental interest] of the *O'Brien* test." *Id.* at 16a (clarification added). The court observed further that

unlike *Pap's* and its own earlier decision in *Sammy's of Mobile, Ltd. v. City of Mobile*, 140 F.3d 993 (11th Cir. 1998), *cert. denied*, 529 U.S. 1052 (2000), the adult businesses had "challenged and disproved the board's findings." *Id.* at 16a. Accordingly, the Eleventh Circuit concluded that, in the language of *Renton*,[3] "it was unreasonable for Defendants to have relied upon remote, foreign studies concerning secondary effects when the county's own current, empirical data conclusively demonstrated that such studies were not relevant to local conditions." *Id.*[4]

The court below commented that, unlike *Renton*, this was not a circumstance where an adult business either did not exist or had just moved into town. To the contrary, the businesses in Fulton County operated for nearly a decade. *Id.* Thus, it held that blind "reliance" upon "foreign" studies was simply not reasonable or permitted under the circumstances.

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[3] *Renton v. Playtime Theatres*, 475 U.S. 41 (1986).

[4] Contrary to the representation made by the County, the "studies from other jurisdictions" did not find "secondary effects caused by adult entertainment establishments." (Pet. at 4-5). These "additional studies" are by now familiar to this Court. *See, e.g.*, Brief of Amici Curiae of the First Amendment Lawyers Association, and Appendix, filed in the case of *City of Erie v. Pap's A.M., supra*, available on LEXIS-NEXIS at 1998 U.S. Briefs 1161 (providing critical analysis of the same "studies" cited by Fulton County concluding that the dated and foreign studies do not link negative secondary effects with adult entertainment establishments).

ARGUMENT

I. The decision below does not raise a significant, *undecided* question of federal constitutional law.

This Court, in recent years, has twice addressed the protection afforded nude dancing in the face of speech-suppressing legislation. *See City of Erie v. Pap's A.M.*, 529 U.S. 277 (2000); *Barnes v. Glen Theatres, Inc.*, 501 U.S. 560 (1991). In these cases, this Court established a standard which requires courts to undertake just the kind of fact-sensitive, "case-by-case" analysis carried out by the Eleventh Circuit in this case. The lower court conscientiously applied this Court's standard and reached the correct result.

The doctrine considered by *Barnes* and explicated by *Pap's* was the secondary effects doctrine and its relationship to the test enunciated in *O'Brien*. *See*, 391 U.S. at 376-77. *Pap's* involved an ordinance almost identical to that in *Barnes* that made it a summary offense to knowingly or intentionally appear in public in a "state of nudity."

This Court, in a plurality opinion by Justice O'Connor, with Justice Souter concurring in part and dissenting in part, reversed the Pennsylvania Supreme Court and held that the Erie ordinance was constitutional. The plurality opinion reviewed *Barnes* and essentially adopted the doctrines set out therein by reaffirming the content-neutral nature of the ordinance, and applying the *O'Brien* test. In so holding, this Court found that Erie relied on its own findings and noted the first-hand knowledge which the city council members had of what took place around

nude dancing establishments in Erie. With this understanding, this Court stated:

> Here, Kandyland has had ample opportunity to contest the council's findings about secondary effects – before the council itself, throughout the state proceedings, and before this Court. Yet to this day, Kandyland has never challenged the city council's findings or cast any specific doubt on the validity of those findings. Instead, it has simply asserted that the council's evidentiary proof was lacking. In the absence of any reason to doubt it, the city's expert judgment should be credited.

Pap's, 529 U.S. at 298.

The above-quoted language lends concrete support for the analysis carried out by the Eleventh Circuit. So, although a legislative body is not *required* to cause empirical studies of secondary effects to be prepared, where empirical data has been prepared and properly submitted to the legislative body prior to the adoption of a questioned ordinance or statute, the empirical data cannot be ignored.[5] Here, the Clubs commissioned studies of real estate values, and neighborhood conditions which showed that no adverse secondary effects existed in Fulton County. The County in turn commissioned a similar study which found the Clubs' studies to be accurate. The

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[5] *Compare Wall Distribs., Inc. v. City of Newport News*, 782 F.2d 1165, 1169 n.7 (4th Cir. 1986) ("To insist that governmental interests justifying such legislation could only be found in specific local experiences and conditions would be unrealistically to require deliberate subjection to those experiences and conditions before attempting to avoid them.")

County also prepared a study of crime and found a lower crime rate at nude clubs than other alcohol-serving establishments. The Clubs thus completed the steps outlined in *Pap's* and moved within the ambit of that case.

It is clear that Question I (of the County's "Questions Presented," *see* Pet. at i) incorporates a misstatement of the Eleventh Circuit's holding. The Eleventh Circuit did not hold that Fulton County must suffer negative secondary effects or that it must ignore foreign studies. Rather the Eleventh Circuit held that given the factual record before it, which included foreign and local studies, Fulton County had no reasonable basis to believe that the ordinance it proposed would "further a substantial governmental interest."

Indeed, the courts of appeals have uniformly applied the *O'Brien* test explicated above, but to very different facts and therefore have reached different conclusions. There is no reason to believe that other courts would have disagreed with the Eleventh Circuit if presented with the facts of this case.

II. The decision below does not conflict with any decision in any Circuit.

The County asserts the existence of conflict among the circuits, relying principally upon cases such as *DiMa Corporation v. Town of Hallie*, 185 F.3d 823 (7th Cir. 1999) to support its proposition. These cases do not conflict with, but are supportive of, the Eleventh Circuit's analysis.

A common ground in all First Amendment cases is that the factual record will affect the outcome. This Court

has repeatedly insisted that when a government seeks to justify a restriction on speech "as a means to redress past harms or prevent anticipated harms," it "must demonstrate that the recited harms are real, not merely conjectural." *Turner Broadcasting System v. FCC*, 512 U.S. 622 (1994); *Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993). Even appellate courts hearing free speech cases must independently review the factual records developed by trial courts or administrative agencies. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group*, 515 U.S. 557, 566-68 (1995) (independently reviewing a state court judgment). Independent review of the facts is required "to be sure that the speech in question actually falls within the unprotected category and to confine the parameters of any unprotected category within acceptably narrow limits." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 505 (1984).

When laws infringing First Amendment rights are challenged, other circuits recognize that the factual record must be examined. In *DiMa*, for example, the town of Hallie adopted an ordinance regulating "adult-oriented establishments in various ways." The plaintiff only challenged one of the restrictions: the hours of operation. *DiMa*, 185 F.3d at 826. The case involved a facial challenge, *id.* at 826-27, in which the court's analysis "focus[ed] only on the first prong" of the time, place and manner test. *See id.* at 822 *citing Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (the first prong addresses whether restrictions are justified without reference to the content of the regulated speech).

The town of Hallie did not compile evidence regarding the hours of operation prior to enacting the ordinance. *Id.* at 829. In fact, although affirming the district court's decision to uphold the ordinance, the Seventh Circuit recognized that Hallie had "only minimally" justified the restriction. *Id.* at 830. Referring to the legislative record as "meager," *id.* at 831, the court nonetheless held the evidence sufficient, noting

> DiMa's First Amendment challenge is limited to the ordinance's hours of operation regulation, and we have no reason to believe that this is a significant impairment of Pure Pleasure's business.

Id. at 831.[6]

Other cases cited by the County only highlight the settled rule of law that factual records must be examined. *See, e.g., Genusa v. City of Peoria*, 619 F.2d 1203 (7th Cir. 1980) (holding "*nothing in the record* of this case or in common experience would warrant this court in concluding that adult bookstores contribute less than other forms of adult use to the injurious effects that may stem from a congregation of adult uses," *id.* at 1213, "[t]here is *nothing in the record* to indicate that adult bookstores, as a class, contain more faulty light switches or other violations

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[6] It should be noted that Respondents Mardi Gras, Flashers, and Fannies each placed uncontradicted affidavits in the record, in which they provided their annual gross revenues and profits (from previous years) derived from the sale of alcoholic beverages. The numbers were substantial. These sales figures supported the testimony of the Clubs that the Ordinance would seriously impair their ability to operate in a nude dance format in the greater Atlanta area.

than regular bookstores, as a class," *id.* at 1214, holding that certain disclosure requirements "cannot be sustained as furthering the state interest *shown by this record*," *id.* at 1216 (all emphasis added); *see also Mitchell v. Comm'n on Adult Entm't Establishments on the State of Delaware*, 10 F.3d 123 (3rd Cir. 1993) (holding "we believe the evidence *on this record* is sufficient to show Delaware had a substantial governmental interest in regulating the incidental adverse effects of Adult Book's speech-related activity," *id.* at 136-37, "A review of *this record reveals . . .* " *id.* at 141, "*This record shows* that the open-booth requirement was not enacted out of a mere unsupported legislative preference for the open booths or because the legislature arbitrarily or irrationally believed that closed booths contribute to serious health problems." *Id.* at 143 (all emphasis added).

Perhaps a different conclusion might have been reached had the local government not studied its *existing* adult businesses. *Compare Ambassador Books & Video, Inc. v. City of Little Rock*, 20 F.3d 858 (8th Cir. 1994) (court "reject[ing] the argument that adult business ordinances must be founded upon local experience," *id.* at 864, because the zoning ordinance was only enacted in response to a first-time adult business, *id.* at 859.). Or perhaps a sparse legislative record would have caused a different conclusion. *Compare Postscript Enters. v. City of Bridgeton*, 905 F.2d 223, 224 (8th Cir. 1990) (where "a formal record of the city council's proceedings concerning the ordinance d[id] not exist"). Those facts simply were not present in this case.

The Eleventh Circuit has not imposed an obligation on local governments to ignore foreign studies, or to

conduct their own, but rather has made clear that unreasonable restrictions on protected expression will not be tolerated under the First Amendment.

CONCLUSION

The Petition fails to demonstrate any valid ground for review of the decision below, and should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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(7)

No. 01-144

In The

Supreme Court of the United States

FULTON COUNTY, GEORGIA, et al.,

Petitioners,

v.

FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS FLANIGAN'S ENTERPRISES, INC. OF GEORGIA, 6420 ROSWELL ROAD, INC., HARRY FREESE, FANNIES, INC., AND WILLIAM H. PARKS, JR.'S SUPPLEMENTAL BRIEF IN OPPOSITION

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28 pp

INCORPORATION BY REFERENCE

Respondents incorporate by reference herein the portions of their Brief in Opposition titled Parties to the Proceeding and Statement Pursuant to Rule 29.6.

SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Ordinance has been expressly repealed. Flanigan's Enterprises, Inc. of Georgia, 6420 Roswell Road, Inc., Harry Freese, Fannies, Inc., and William H. Parks, Jr. (collectively "the Clubs") believe that the repealer renders the Petition for Writ of Certiorari moot.

SUPPLEMENT TO STATEMENT OF THE CASE

On or about August 15, 2001, Fulton County and its Board of Commissioners (collectively "the County") enacted a new comprehensive adult entertainment code titled "Article III, Adult Entertainment Establishments" ("the 2001 Ordinance.") *See* Appendix A. Among the provisions contained in the 2001 Ordinance is a repealer. *See* Section 18-93. The repealer section provides "[a]ny provisions of Chapter 18, Article III of the Code of Laws of Fulton County inconsistent herewith are hereby repealed, specifically, sections 18-76 through 18-145." *Id.* This Court will note that the Ordinance, which is the subject of the County's Petition, was previously codified as Fulton County Code § 18-76(7). *See* Pet. at 46a-50a.

When repealing the Ordinance, the County enacted a similarly worded provision under a different section, § 18-79(17). That section provides "no alcoholic beverages of any kind shall be sold, possessed or consumed on the premises of an adult entertainment establishment." To

date, the Clubs have not challenged the factual record supporting the 2001 Ordinance.

ARGUMENT

This case now concerns an ordinance which has been repealed and replaced. Following the Eleventh Circuit's decision wherein it held that Fulton County lacked an adequate factual basis to apply the Ordinance to the Clubs, the County repealed the Ordinance. It then compiled another legislative record to enact an admittedly similar ordinance provision. Today, however, whether this Court determines that the County had an adequate factual basis to support the Ordinance or not, the Clubs are no longer seeking declaratory relief from the Ordinance.

"[A]ny challenge to the new law 'presents a different case,' " and therefore the proper course is to decline to grant certiorari. *Cf. Northeastern Florida Chapter of Associated General Contractors v. City of Jacksonville*, 508 U.S. 656, 675 (1993) *quoting Allee v. Medrano*, 416 U.S. 802, 818 (1974) (J., O'Connor, dissenting). As stated in the Brief in Opposition, every First Amendment case turns on its own facts. The 2001 Ordinance rests upon different facts. Thus, to render a decision on the Ordinance would be to render an advisory opinion. *Compare Diffenderfer v. Central Baptist Church of Miami, Inc.*, 404 U.S. 412 (1972).

CONCLUSION

Because the County seeks an advisory opinion, and because the Ordinance has been repealed, the Petition must be denied.

Respectfully submitted,

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APPENDIX A

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CHAPTER 18 BUSINESSES

ARTICLE III. ADULT ENTERTAINMENT ESTABLISHMENTS

DIVISION 1. GENERALLY

Sec. 18-76 Purpose and Preamble.

The purpose of this Article is to regulate adult entertainment establishments with the intention that, through this ordinance, many types of criminal activities frequently engendered by such businesses and the adverse effect on property values and on the public health, safety, and welfare of the County, and on its citizens and property, and on the character of its neighborhoods and development, will be curtailed and/or prevented. This Article is not intended as a de facto prohibition of legally protected forms of expression. This Article is intended to represent a balancing of competing interests; reduced criminal activity and protection of neighborhoods and

development through the regulation of adult entertainment establishments versus any legally protected rights of adult entertainment establishments and patrons. This Article is not intended to allow or license any business, establishment, or activity which would otherwise be unlawful.

Sec. 18-77 Severability and conflict.

1. Should any section or provision of this Article be declared by a court of competent jurisdiction to be invalid or unconstitutional, such decision shall not affect the validity of this Article as a whole nor any part hereof other than the part so declared to be invalid or unconstitutional.

2. Should any section or provision of this Article be in conflict with any other ordinance, rule, regulation, or law, the more restrictive section or provision shall prevail.

Sec. 18-78 Definitions.

As used in this Article, the following words or phrases shall have the following meanings:

1. "Adult bookstore" is a bookstore having as a preponderance of its publications, books, magazines, periodicals, videotapes, and other media which are distinguished or characterized by their emphasis on matter depicting, describing, or relating to specified sexual activities or specified anatomical areas.

2. "Adult entertainment" means the permitting, performing, or engaging in live acts:

    a. Of touching, caressing, or fondling of the breasts, buttocks, anus, vulva, or genitals;

b. Of displaying of any portion of the areola of the female breast or any portion of his or her pubic hair, cleft of the buttocks, anus, vulva, or genitals;

c. Of displaying of pubic hair, anus, vulva, or genitals; or

d. Which simulate sexual intercourse (homosexual or heterosexual), masturbation, sodomy, bestiality, oral copulation, or flagellation.

3. "Adult entertainment establishment" means the premises of any facility upon which an adult entertainment business or adult bookstore operates or upon which such defined activities occur. The definition of an adult entertainment establishment shall not apply to nor prohibit the live performance of legitimate plays, operas, ballets, or concerts at a concert house, museum, or educational institution or facility holding an alcoholic beverage license, which derives less than 20 percent of its gross receipts from the sale of alcoholic beverages.

4. "Board of Commissioners/Board" means the Board of Commissioners of Fulton County, Georgia or its designee(s).

5. "Church" means a temple, building, or other house of religious worship consecrated to the honor of God or other supreme being and religion; or an assembly of persons united by the profession of the same religious faith, meeting together routinely for religious worship. This shall include, on the same lot, accessory structures and uses such as a minister's or caretaker's residence.

6. "County" means Fulton County, Georgia.

7. "Good moral character", with respect to a person, is defined as the lack of a conviction of, or plead of

guilty or nolo contendere to, a drug or alcohol related felony or sex-related crime in the past five years and the lack of an outstanding arrest for a drug or alcohol-related felony or sex-related crime.

8. "Employee". For the purposes of this Article, an employee is a compensated worker in an adult entertainment establishment, regardless of the method of compensation. Independent contractors shall be considered employees and shall be required to have permits as employees, regardless of the business relationship with the owner or licensee of any adult entertainment establishment.

9. "Minor" means any person who has not attained the age of 18 years.

10. "Preponderance" is defined as the state of being greater than, and not equal to, 50 percent.

11. "Specified anatomical areas" shall include less than completely and opaquely covered human genitals, pubic regions, buttocks, or female breasts below a point immediately above the top of the areola; and human male genitals in a discernibly turgid state, even if completely and opaquely covered.

12. "Specified sexual activities" shall include any of the following: human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse (homosexual or heterosexual) or sodomy; fondling or other erotic touching of human genitals, pubic regions, buttocks, or female breasts.

Sec. 18-79 Regulations.

The following regulations shall apply to all adult entertainment establishments, as defined in the preceding section:

1. All employees of an adult entertainment establishment shall be required to obtain an individual employee permit in accordance with the provisions of this Article.

2. All adult entertainment establishments shall be required to obtain an occupation tax certificate (formally known as a business license) from the Fulton County Tax Commissioner's Office in accordance with the provisions set forth in § 18-31, *et seq.* of the Fulton County Code. In addition to the occupation tax certificate, all such establishments shall obtain an adult entertainment license for its operation in accordance with this Article.

3. No person, firm, partnership, corporation, or other entity shall advertise, or cause to be advertised, an adult entertainment establishment without a valid adult entertainment establishment license issued pursuant to this Article. Such license shall be displayed in a prominent place on the premises at all times.

4. An adult entertainment establishment licensee shall maintain and retain for a period of 3 years records showing the names, addresses, and ages of all persons employed as dancers. All records are subject to inspection at any time by the Fulton County Tax Commissioner's Office and/or Police Department.

5. No adult entertainment establishment licensee shall employ or contract with a person as a dancer who is under the age of 18 years or a person not licensed pursuant to this Article.

6. It is unlawful for a licensee to admit or permit the admission of anyone under 18 years of age into an adult entertainment establishment. Furthermore, it is unlawful for any person to sell, barter, or give to any minor any service, material, device, or thing sold or offered for sale by an adult entertainment establishment.

7. Adult entertainment establishments shall be closed between the hours of 2:55 a.m. and 9:00 a.m. on Sundays and between 4:00 a.m. and 9:00 a.m. on all other days.

8. No employee shall fondle or caress any patron and no patron shall fondle or caress any employee.

9. All dancing and adult entertainment shall occur on a stage intended for that purpose which is raised at least 2 feet from the next-highest level of the remainder of the floor and which is permanently affixed to the flooring of the establishment. No patron shall be permitted on such a stage. All such stages are subject to and must conform with any applicable building and fire code(s).

10. No tips for any employee shall be placed on the person of the performer except by hand to hand contact. No employee shall solicit any pay or gratuity from any patron.

11. Employees of an adult entertainment establishment shall be not less than 18 years of age.

12. All premises licensed under this Article shall be fully lighted both inside and outside, except during hours when the establishment is not open for business. Interior lighting shall be at least negative (-) 3 foot candles per square foot.

13. No person shall conduct any illegal activity in or upon any premises licensed under this Article.

14. No licensee shall suffer or permit an employee or any person on the premises to insert an object into her vagina or her or his anal orifice, except for personal hygiene or medical related-reasons.

15. No licensee shall suffer or permit a male employee or any person on the premises to exhibit an unclothed erect penis.

16. No person, while on licensed premises, shall, while nude or semi-nude, be permitted to sit upon or straddle the leg, legs, lap or body of any patron, spectator, employee or other person therein.

17. No alcoholic beverages of any kind shall be sold, possessed or consumed on the premises of an adult entertainment establishment.

18. No adult entertainment establishment shall be conducted, operated or licensed if any adult entertainment activity on the premises is visible from the exterior of the premises.

19. No booth, screen, partition or other obstruction shall be permitted within the interior of any such establishment so as to prevent a clear view throughout the premises, except for separate offices, kitchens, restrooms or other areas not frequented by patrons.

20. All premises shall be kept clean and in proper sanitary condition and in accordance with all state laws and local ordinances. Adequate facilities, equipment, and supplies shall be provided to meet this requirement and adequate ventilation and illumination shall be provided to permit a thorough, complete cleaning of the entire licensed premises. Trash and garbage shall not be permitted to accumulate or to become a nuisance on or in the immediate vicinity of the licensed premises but shall be disposed of daily or more frequently if necessary to prevent accumulation. The licensee or his designee shall make sanitary inspections of the premises at least every 15 days and shall record his findings on forms supplied by the Fulton County Health Department. Each licensed premises shall post and maintain in a readily accessible place a schedule for maintaining the sanitation of the premises.

Sec. 18-80 Unlawful operation declared nuisance; compliance with state laws, local ordinances, regulations, and codes required.

1. Any adult entertainment establishment operated, conducted or maintained contrary to the provisions of this Article is hereby declared to be unlawful and a public nuisance. The County may, in addition to or in lieu of all other remedies, commence an action or proceeding for abatement, removal or enjoinment thereof, in the manner provided by law.

2. No adult entertainment establishment shall be conducted on any premises which do not comply with all current zoning, building code, health, fire, and other applicable County ordinances and state laws and regulations.

DIVISION 2. LICENSE AND PERMIT

Sec. 18-81 Adult entertainment establishment employees and employee permits.

1. Approval for employment. Before any person may work in an adult entertainment establishment, the person shall file an application for an employee permit with the Alcohol and business Tax Division of the Fulton County Tax Commissioner's Office on forms provided by said office. A non-refundable investigation fee of $50.00 and a $300.00 permit fee for all employees shall accompany the permit application. The Tax Commissioner's Office shall issue a receipt showing that such fee has been paid.

2. Said application shall contain the following:

   a. Name, address, date of birth, sex, and social security number of applicant;

b. The name, address, and phone number of the adult entertainment establishment applicant will be employed with; and

c. A fingerprint of applicant made by the Fulton County Police Department. Fingerprints must be made at least 15 days prior to the issuance of an employee permit to allow for the investigation of the applicant. Said fingerprints shall be attached to the application for the permit.

3. The Fulton County Business Tax Division must be notified of any change in the above information (such as employment with another adult entertainment establishment or name or address change) within 15 days of such change.

4. Any material omission or untrue or misleading information contained in or left out of an employee permit application shall be unlawful and shall be cause for a denial, suspension or revocation thereof, and shall be punishable as a violation of this Ordinance.

5. The County shall have 30 days from the date the application is submitted to investigate the information presented in the permit application. If the employee is found to be of good moral character as defined in this Article, and all other application requirements are met, the Tax Commissioner shall grant approval of the permit and send notification to the employee via U.S. mail to the address listed on the application. If no decision is issued within the 30 day period, the employee's permit shall automatically issue on the 40th day. Upon approval, the employee may begin working on the regulated premises.

6. If approval is denied, the prospective employee may, within 10 days of notice of said denial, apply to the

Board of Commissioners for a hearing. The Board shall consider the appeal at its next regularly scheduled meeting at which time it shall make a decision to grant or deny the permit in accordance with the requirements of this section. The decision of the Board of Commissioners with regard to whether or not to grant or deny the permit is a final action.

7. Each employee permit is valid for a period of 1 year from the date of issuance. Renewal permits shall be granted for a non-refundable fee of $50.00 subject to an updated investigation by the Fulton County Police Department based upon the information contained in the employee's application on file at the time of the renewal.

8. No permit issued under this section shall be suspended or revoked except for due cause as defined in this section, and after a hearing before the Board of Commissioners following written notice to the holder of such permit of the time, place, and purpose of such hearing, along with a summary of the charge(s) upon which such hearing shall be held. Such notice shall be addressed to the employee via U.S. mail to the address listed on the application form. Three days' notice shall be deemed reasonable, but shorter or longer periods of notice shall be authorized as the circumstances may justify. The decision of the Board with regard to the suspension or revocation of an employee's permit is a final action; therefore, any appeal of such decision may be pursued by an application for Writ of Certiorari by the prospective employee within 30 days of the Board's decision.

9. The following shall constitute due cause for the suspension or revocation of an employee permit:

   a. If an employee has been granted an employee permit under the terms of this section but his/

her permit application is later found to have contained any material omission or untrue or misleading information.

b. If an employee pleads guilty or nolo contendere or is arrested for or convicted of a drug or alcohol related felony, sex-related crime, or a crime involving moral turpitude.

Sec. 18-82 Application for an adult entertainment establishment license.

1. Any person or business entity desiring to operate an adult entertainment establishment within Fulton County shall be required to obtain, in addition to the occupation tax certificate, an adult entertainment establishment license ("license") issued by the Fulton County Tax Commissioner's Office.

2. It is unlawful for any person or business entity to operate within Fulton County any adult entertainment establishment, as defined in this Article, without a valid adult entertainment establishment license. No such license so issued shall condone or make legal any activity thereunder if the same is deemed illegal or unlawful under the laws of the State of Georgia or the United States.

3. A non-refundable processing fee of $6,000.00 shall accompany the adult entertainment license application to defray, in part, the cost of investigation and report required by this Article The Tax Commissioner's Office shall issue a receipt showing that such fee has been paid.

4. The application for license does not authorize the engaging in, operation of, conducting of or carrying on of any adult entertainment activities in such an establishment.

Sec. 18-83 Adult entertainment license application contents.

Each application for an adult entertainment establishment license shall contain the following information:

1. The applicant's full true name.
2. The present address, telephone number, and social security number (or federal tax identification number) of the applicant.
3. Acceptable written proof that the applicant is at least 18 years of age.
4. Business, occupation, or employment history of the applicant for the 5 years preceding the date of application. Business and employment records for this time period shall be made available to the County upon request.
5. The adult entertainment establishment license or business license history of the applicant and whether such applicant, in previous operations in Fulton County or any other state or political subdivision thereof, has had any such licenses revoked or suspended and the reason(s) therefore, and the business activity or occupation subsequent to such action of suspension or revocation.
6. If the applicant is a corporation, the name of the corporation shall be set forth exactly as showing in its articles of incorporation or charter, together with the place and date of incorporation, the names and addresses of each of its current officers and directors, and a copy of its articles of incorporation filed with the Secretary of State. If the applicant is a limited liability company, a copy of its articles of organization filed with the Secretary of State,

together with the names and addresses of each of its members and manager(s), if applicable. If the applicant is a partnership, the applicant shall set forth the name, residence address and dates of birth of the partners. If the applicant is a limited partnership, it shall furnish a copy of its certificate of limited partnership election filed with the applicable Clerk of Superior Court. If one or more of the partners is a corporation, the provisions of this subsection pertaining to corporation shall apply. The applicant corporation or partnership shall designate one of its officers or general partners to act as its responsible managing officer. Such designated persons shall complete and sign all application forms required of an individual applicant under this Article, but only one application fee shall be charged.

7. If the applicant, any partners, members, managers, corporate officers or directors have been convicted of, or pleaded guilty or nolo contendere to, a drug or alcohol related felony or sex-related crime in the past five years or has an outstanding arrest for a drug or alcohol-related felony or sex-related crime, a complete description of any such crime including date of violation, date of conviction, jurisdiction, and any disposition, including any fine or sentence imposed and whether terms of disposition have been fully completed.

8. If applicant is a person doing business under a trade name, a copy of the trade name properly recorded.

9. Address of the premises to be regulated and whether the premises are owned or rented.

10. A statement that said adult entertainment establishment meets all applicable County ordinances and state laws and regulations.

11. Each application for an adult entertainment establishment license shall be verified and acknowledged under oath to be true and correct by:

    a. The applicant if the applicant is an individual;

    b. By the managing or general partner if the applicant is a partnership;

    c. By the president of the corporation if the applicant is a corporation;

    d. By the members or manager(s) of a limited liability company; or

    e. By the chief administrative official if the applicant is any other organization or association.

12. Each application must be complete in its entirety before being accepted by the County for filing and processing. All applicants shall furnish all data, information, and records pertinent to obtaining an adult entertainment establishment license which is requested by the County and failure to furnish such data, information, and records shall suspend the application process until the data, information and records are submitted and if not submitted within 30 days from the date of such request, the application shall be deemed withdrawn.

Sec. 18-84 Application investigation.

The County shall have 45 days (unless the application is suspended by the failure of the applicant to provide data, information or records as reasonably requested by the County to complete the investigation) from the receipt of a completed application to make a decision in which to grant or deny an adult entertainment establishment

license. The Tax Commissioner shall make a recommendation to the Board of Commissioners regarding the approval or denial of the license and the Board shall make the final decision after a public hearing regarding the same. In the event the Board of Commissioners has not granted or denied the application within 45 days (unless the application is suspended by the failure of the applicant to provide data, information or records as reasonably requested by the County to complete the investigation), the license shall automatically issue and the applicant shall have the right to operate its adult entertainment establishment.

Sec. 18-85 General qualifications of applicant.

No license for an adult entertainment establishment provided for by this Article shall be issued to or held by:

1. Any applicant who has not paid all required fees and taxes for a business at that location.

2. Any person or business entity who is not of good moral character as defined in this Article, is not qualified to hold and conduct business according to the laws of the United States, State of Georgia or Fulton County, or who has had any license for an adult entertainment establishment or for the sale of alcoholic beverages in Fulton County or any other state or political subdivision thereof previously suspended or revoked.

3. Any applicant whose license had been rejected or withdrawn without permission of the Board of Commissioners within 7 days immediately preceding the date set for the hearing before the board, unless at least 1 year shall have expired from such rejection or

withdrawal of said application. This requirement shall not apply where the applicant applies for a new location that had not been rejected or withdrawn within the 1 year period.

4. Any applicant where there is evidence that, even though there is compliance with the minimum distance requirements as set forth in the Zoning Resolution, the type and number of schools or churches or other such facilities in the vicinity of the adult entertainment establishment causes minors to frequent the immediate area.

5. Any applicant if applicant is a previous holder of any license under this Article or of an alcoholic beverage license, the manner in which the applicant conducted the business thereunder as to the necessity for unusual police observation and inspection in order to prevent the violation of any law, regulation or ordinance relating to such business;

6. An applicant if the applicant's spouse could not meet the qualifications of an applicant, particularly if it appears that the applicant's spouse or another person is using the applicant as a guise or "dummy" to obtain a license.

Sec. 18-86 Notice of intent to operate an adult entertainment establishment.

1. Newspaper Advertisement
   a. The applicant for an adult entertainment license under this Article shall give notice that an application has been filed by publication of an advertisement once a week for 2 consecutive weeks prior to the date of consideration of the application by the board of Commissioners in the newspaper in which legal advertisements are published in Fulton County. Said notice need not

appear on the same day as legal advertisements are regularly published.

b. The advertisement shall not appear more than 30 days prior to the date of such consideration. The advertisement shall be of type not smaller than ten-point capital and lower case and shall be at least a one-inch column.

c. The advertisement shall contain a particular description of the location of the proposed business and the name of the applicant or business designees named in § 18-83(6) and the time and place of the Board of Commissioners' hearing at which time the license shall be considered.

2. Signage on Property

The applicant shall cause to be placed upon the location of the proposed business a sign stating the following: "A Fulton County Adult Entertainment License has been applied for. Any objection to this application must be made at or prior to ___ o'clock ___, on the day of ___, 20__, in Assembly Hall located at 141 Pryor Street, S.W. Atlanta, Georgia, which is the date and time of Board of Commissioners' hearing." The sign shall be at least 18 inches by 24 inches in size and shall face toward all public streets, sidewalks or other public property which adjoins the location so as to be clearly visible by persons using such public area. The sign shall be posted on the property from the date of the first publication of the newspaper advertisement through the date of the consideration by the board.

Sec. 18-87 Adult entertainment license notice of denial; appeal.

In the event the application for an adult entertainment establishment license is denied by the board of Commissioners, the applicant shall be notified in writing of such denial within 10 days by U.S. mail. A decision by the Board of Commissioners regarding denial of said license is a final action; therefore, any appeal of such decision shall be pursued by application for Writ of Certiorari filed with the Superior Court of Fulton County within 30 days of the decision.

Sec. 18-88 Renewal of adult entertainment license.

Each adult entertainment license is valid for a period of 1 year from the date of issuance. The license may be renewed provided that the licensee continues to meet the requirements set out in this Article. Renewal applications are due 2 months prior to the expiration of the license and shall include a non-refundable renewal fee of $4,000.00 prior to an updated investigation by the Fulton County Police based upon the information contained on file at the time of the renewal. In the event no action is taken on the renewal application by the expiration date of the previously issued license, the licensee shall have the right to continue operation for the renewal year.

Sec. 18-89 Adult entertainment licenses are non-transferable.

No license for an adult entertainment establishment may be sold, transferred or assigned by a licensee, or by

operation of law, to any other person(s) or business entity. Any such sale, transfer or assignment, or attempted sale, transfer or assignment, shall be deemed to constitute a voluntary surrender of such license and such license shall thereafter be null and void; provided and excepted, however, that if the licensee is a partnership and one or more of the partners should die, one or more of the surviving partners may acquire, by purchase or otherwise, the interest of the deceased partner or partners without effecting a surrender or termination of such license, and in such case, the license, upon notification to the County, shall be placed in the name of the surviving partner. A license issued to a corporation shall be deemed terminated and void when either any outstanding stock of the corporation is sold, transferred or assigned after the issuance of a license, or any stock authorized but not issued at the time of the granting of such license and is thereafter issued and sold, transferred or assigned. A license issued to a limited liability company shall be deemed terminated and void when any member(s) and manager(s) are added who have not been previously identified on the license application.

Sec. 18-90 Change of location or name of adult entertainment establishment.

1. No licensee shall change the location of the establishment without obtaining a new license. An application for a license due to a change of location is subject to all requirements of this Article.

2. Upon change of the name of the establishment, the licensee must notify the Alcohol and Business Tax

Division of the Fulton County Tax Commissioner's Office within 30 days prior to the change.

3. No licensee shall operate, conduct, manage, engage in, or carry on an adult entertainment establishment under any name other than his name and the name of the business as specified on his or her adult entertainment license.

Sec. 18-91 Procedure for suspension of revocation of an adult entertainment license.

1. No license issued under this Article shall be suspended or revoked except for due cause as defined in this section, and after a hearing before the Board of Commissioners following written notice to the holder of such license of the time, place and purpose of such hearing, along with a summary of the charge(s) upon which such hearing shall be held. Such notice shall be addressed to the licensee at the last address the licensee provided to the County. Three days' notice shall be deemed reasonable, but shorter or longer periods of notice shall be authorized as the circumstances may justify.

2. The following shall constitute due cause for suspension or revocation of a license:

   a. The violation of any federal or state laws or regulations or local ordinances by either the applicant or business entity that owns, in whole or in part, the adult entertainment establishment;

   b. A determination that said applicant/business designees named in § 18-83(6) no longer meet the requirement of having good moral character, as defined in this Article or that any person or

business entity is not qualified to hold and conduct business according to the laws of the United States, State of Georgia or Fulton County;

c. If its is discovered that the license application (or renewal application) is found to have contained any material omission or untrue or misleading information; or

d. A violation of any other section of this Article.

3. Following the Board of Commissioners' hearing on this matter, the Board may suspend or revoke the license of the adult entertainment establishment. The decision of the Board with regard to the suspension or revocation of an adult entertainment establishment license is a final action; therefore, any appeal of such decision shall be pursued by application for Writ of Certiorari filed with the Superior Court of Fulton County within 30 days of the decision.

4. When any adult entertainment establishment license is revoked or suspended, all signs indicating that such business is conducted on the premises shall be removed, both outside and inside, during the period of revocation or suspension.

Sec. 18-92 Penalty for violation of this Article.

Any person violating the provisions of this Article shall be subject to punishment by a fine not to exceed $1,000.00 or imprisonment for 60 days, or both.

Sec. 18-93 Repealer.

Any provisions of Chapter 18, Article III of the Code of Laws of Fulton County inconsistent herewith are hereby repealed, specifically sections 18-76 through 18-145.

Sec. 18-94 - Effective date.

This Article shall become effective upon the adoption of this Ordinance, except for the provisions regarding obtaining an adult entertainment license for any establishment which has been granted a license prior to the date of adoption of this Ordinance; each such pre-existing establishment must meet the licensing standards of this Ordinance at the time its current adult entertainment license expires.

Sec. 18-95-145 Reserved.